# DEFENSE vs. DISCIPLINE

## DUE PROCESS AND JUST CAUSE

## IN OUR

## COLLECTIVE BARGAINING AGREEMENT

# A Strategy Book

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# FOREWORD

This handbook, my twelfth as a National Officer, is designed to place into a single accessible package the strategies necessary for members, stewards, officers, and arbitration advocates to provide the best possible defense when disciplinary actions are imposed. Through usage of the Just Cause definition, the interview, the Collective Bargaining Agreement and arbitral history, this Handbook is intended to promote thorough and well-reasoned grievance initiation, investigation, processing and arbitration advocacy in disciplinary instances.

As procedural and due process issues increasingly replace arguments "on the merits", we must turn to Just Cause as it is defined and as it should be applied by management, the arbitrators, and yes, by stewards and advocates. We win a far greater percentage of disciplinary cases based upon due process then we ever have in the past; but too many valuable and job-saving due process arguments are never explored much less pursued. It is my hope that this Handbook will enable stewards and advocates to successfully pursue the arguments to better defend our members.

Following the introductory section covering Just Cause, each chapter discusses, in detail, a particular due process subject. Included are a definition and explanation of the issue, the Union's argument, the applicable Collective Bargaining Agreement provisions and/or National level arbitration mandates, the interview, and regional support.

Although some parts of this Handbook are directed more to the shop steward than to the arbitration advocate – and vice versa – all the information contained herein should provide everyone in our Union with a better understanding and ability to deal with the disciplinary process and the defenses necessary to protect membership.

Yours in Unionism, I am

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**THEY HAVE MADE THE DIFFERENCE**

I also thank the following former National Business Agents who responded to my request for additional arbitral reference, some of which appears in this Strategy Book:

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# DEDICATION

This Handbook is dedicated to my wife, Congetta. Without her enthusiasm, wisdom, intuition and commitment to the cause, it would not have come into being.

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Many special thanks to Lu-Ann Glaser, former President of the Keystone Area Local, for her tireless efforts in the revised production of this Handbook.

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# INTRODUCTION

Before we begin with the just cause discussion, a requirement in grievance processing must be emphasized. **WE MUST RAISE OUR JUST CAUSE AND DUE PROCESS ISSUES AND ARGUMENTS IN SPECIFIC DETAIL NO LATER THAN IN THE WRITTEN STEP 2 APPEAL.** Article 15 of the Collective Bargaining Agreement states:

**ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE**

**Section 2. Grievance Procedure Steps**

**Step 1:**
**(d)The Union shall be entitled to appeal an adverse decision to Step 2 of the grievance procedure within ten (10) days after receipt of the supervisor's decision. Such appeal shall be made by completing a standard grievance form developed by agreement of the parties, which shall include appropriate space for at least the following:**

**1. Detailed statement of facts;**
**2. Contentions of the grievant;**
**3. Particular contractual provisions involved; and**
**4. Remedy sought.**

**Step 2(d):**
**At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31. The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above.**

This is the "full disclosure" stage of our grievance/arbitration procedure. We have a contractually required obligation to raise our issues and arguments in detail in our Step 2 appeal or at the Step 2 meeting. Should we fail to raise those arguments at Step 2, management will argue the Union failed to meet its obligation in pursuit of the grievance.
Management will argue their due process rights to address the issues and arguments at the lowest possible step--and thus the possibility of lowest possible step resolution--are violated. Management will, in effect, turn the tables on us and pursue their own due process issues if we fail to fully raise our issues and arguments at Step 2. We must remember that in recent years, the Union has been highly successful in winning due process arguments within the grievance/arbitration procedure and at arbitration. Due process violations in disciplinary cases--such as the improperly conducted Pre-Disciplinary Interview--and in contract cases--such as the lack of proper grievance appeal language in letters of demand--have resulted in a solid history of successful grievance processing. As we have pursued these due process violations to successful ends, management has increasingly sought and pursued due process issues against the Union. Their education in due process is directly related to our successes. For these reasons, we can expect management to raise every due process issue which presents itself, and in particular, our obligation to raise our issues and arguments no later than at Step 2.

Without a commitment and practice to full development of our arguments through thorough grievance investigation and processing, we will see many valuable Union due process issues and USPS violations excluded by arbitrators and of no assistance to the defense of members in need.

## CHAPTER 1

# JUST CAUSE

**One of the most** misunderstood concepts and requirements of our Collective Bargaining agreement is the Just Cause mandate under Article 16. Managers are often not held to proving they issued discipline for Just Cause. Arbitrators are often not held to issuing decisions which apply the standards of Just Cause. Grievances are often not investigated, processed, and presented in a method requiring management to meet the tests of Just Cause.

**We begin** where Just Cause first appears in our Collective Bargaining Agreement:

"**ARTICLE 16** DISCIPLINE PROCEDURE

Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay."

**The above quoted** provision explains that Management must have just cause to issue discipline, but the provision does not explain what just cause is. In Collective Bargaining Agreements throughout the United States, ours may be unique in that we have a clear definition of what just cause is. That definition is found in the **EL-921 Handbook, "Supervisor's Guide to Handling Grievances",** under Article 19 of the Collective Bargaining Agreement:

"Just Cause

What is just cause? The definition of just cause varies from case to case, but arbitrators frequently divide the question of just cause into six sub-questions and often apply the following criteria to determine whether the action was for just cause. These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

Is there a rule?

Is the rule a reasonable rule?

Is the rule consistently and equitably enforced?

Was a thorough investigation completed?

Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?

Was the disciplinary action taken in a timely manner?"

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**The definition of Just Cause** stated in the EL-921 is based upon the benchmark definition developed and first stated by **Arbitrator Carroll R. Daugherty** in the Grief Brothers Cooperage Corp. decision in 1964 and in a later decision, **Enterprise Wire Company** (1966**).** Arbitrator Daugherty stated:

"Few if any union-management agreements contain a definition of "just cause." Nevertheless, over the years the opinions of arbitrators in innumerable discipline cases have developed a sort of "common law" definition thereof. This definition consists of a set of guidelines or criteria that are to be applied to the facts of any one case, and said criteria are set forth below in the form of questions.

A no answer to any one or more of the following questions normally signifies that just and proper cause did not exist. In other words, such no means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

The Questions

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof.

Note 2: There must have been actual oral or written communication of the rules and penalties to the employee.

Note 3: A finding of lack of such communication does not in all cases require a no answer to question 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

Note 4: Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and same need not have been negotiated with the union.

2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

Note: If an employee believes that said rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover), unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Note 1: This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

Note 2: The company's investigation must normally be made before its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time, there has usually been too much hardening of positions. In a very real sense, the company is obligated to conduct itself like a trial court.

Note 3: There may, of course, be circumstances under which management must react immediately to the employee's behavior. In such cases, the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b), if the employee is found innocent after the investigation, he will be restored to his job with full pay for time lost.

Note 4: The company's investigation should include an inquiry into possible justification for the employee's alleged rule violation.

4. Was the company's investigation conducted fairly and objectively?

Note 1: At said investigation the management official may be both "prosecutor" and "judge," but he may not also be a witness against the employee.

Note 2: It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employee and a management person, there are not witnesses to an incident other than the two immediate participants. In such cases, it is particularly important that the management "judge" question the management participant rigorously and thoroughly, just as an actual third party would.

5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Note 1: It is not required that the evidence be conclusive or "beyond all reasonable doubt." But the evidence must be truly substantial and not flimsy.

Note 2: The management "judge" should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.

Note 3: When the testimony of opposing witnesses at the arbitration hearing is irreconcilably in conflict, an arbitrator seldom has any means for resolving the contradictions. His task is then to determine whether the management "judge" originally had reasonable grounds for believing the evidence presented to him by his own people.

6. Has the company applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

Note 1: A no answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

Note 2: If the company has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Note 1: A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good," a "fair," or a "bad" record. Reasonable judgement thereon must be used.)

Note 2: An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

Note 3: Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating" among them in the administration of discipline for said offense. Thus, if employee A's record is significantly bet-

ter than those of employees B, C, and D, the company may properly give A a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.

Note 4: Suppose that the record of the arbitration hearing established firm yes answers to the first six questions. Suppose further that the proven offense of the accused employee was a serious one, such as drunkenness on the job; but the employee's record had been previously unblemished over a long, continuous period of employment with the company. Should the company be held arbitrary and unreasonable if it decided to discharge such an employee? The answer depends of course on all the circumstances. But, as one of the country's oldest arbitration agencies, the National Railroad Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge cases, leniency is the perogative of the employer rather than of the arbitrator; and the latter is not supposed to substitute his judgment in this area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though an arbitrator, if he had been the original "judge," might have imposed a lesser penalty. Actually, the arbitrator may be said, in an important sense, to act as an appellate tribunal whose function is to discover whether the decision of the trial tribunal (the employer) was within the bounds of reasonableness above set forth. In general, the penalty of dismissal for a really serious first offense does not, in itself, warrant a finding of company unreasonableness.

***Arbitrator Carroll Daugherty***
***Enterprise Wire co. 1966***

In addition, the Parties have incorporated the EL921s TESTS into the Joint Contract Interpretation Manual:

**Is There a Rule?**

If so, was the employee aware of the rule? Was the employee forewarned of the disciplinary consequences for failure to follow the rule? It is not enough to say, "Well, everybody knows that rule," or, "The rule was posted ten years ago." Management may have to prove that the employee should have known of the rule.

Certain standards of conduct are normally expected in the industrial environment and it is assumed by arbitrators that employees should be aware of these standards.

For example, an employee charged with intoxication on duty, fighting on duty, pilferage, sabotage, insubordination, etc., would generally be assumed to have understood that these offenses are neither condoned nor acceptable, even though management may not have issued specific regulations to that effect.

**Is the Rule a Reasonable Rule**?

Work rules should be reasonable, based on the overall objective of safe and efficient work performance. Management's rules should be reasonably related to business efficiency, safe operation of our business, and the performance expected of the employee.

**Is the Rule Consistently and Equitably Enforced**?

A rule must be applied fairly and without discrimination. Consistent and equitable enforcement is a critical factor, and claiming failure in this regard is one of the union's most successful defenses.

The Postal Service has been overturned or reversed in some cases because of not consistently and equitably enforcing the rules.

Consistently overlooking employee infractions and then disciplining without warning is one issue. For example, if employees are consistently allowed to smoke in areas designated as No Smoking areas, it is not appropriate suddenly to start disciplining them for this violation.

In such a case, management may lose its right to discipline for that infraction, in effect, unless it first puts employees (and the union) on notice of its intent to enforce that regulation again. Singling out an employee for discipline is another issue. If several similarly situated employees commit the same offense, it is not equitable to discipline only one.

**Was a Thorough Investigation Completed?**

Before administering the discipline, management should conduct an investigation to determine whether the employee committed the offense. The investigation should be thorough and objective.

The investigation should include the employee's "day in court privilege." The employee should know with reasonable detail what the charges are and should be given a reasonable opportunity to defend themselves before the discipline is initiated.

**Was the Severity of the Discipline Reasonably Related to the Infraction Itself and in Line with that Usually Administered, as Well as to the Seriousness of the Employee's Past Record?**

The following is an example of what arbitrators may consider an inequitable discipline: If an installation consistently issues seven calendar day suspensions for a particular offense, it would be extremely difficult to justify why an employee with a past record similar to that of other disciplined employees was issued a fourteen day suspension for the same offense.

There is no precise definition of what establishes a good, fair, or bad record. Reasonable judgment must be used. An employee's record of previous offenses may never be used to establish guilt in a case you presently have under consideration, but it may be used to determine the appropriate disciplinary penalty.

**Was the Disciplinary Action Taken in a Timely Manner?**

Disciplinary actions should be taken as promptly as possible after the offense has been committed.

**From those questions** of Just Cause (or "tests" as they have come to be termed) the **EL-921 "Supervisor's Guide to Handling Grievances"** provides our Collective Bargaining Agreement definition:

"III. Discipline

C. Just Cause

What is just cause? The definition of just cause varies from case to case, but arbitrators frequently divide the question of just cause into six sub-questions and often apply the following criteria to determine whether the action was for just cause. These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

**Is there a rule?**

If so, was the employee aware of the rule? Was the employee forewarned of the disciplinary consequences for failure to follow the rule?

Important: It is not enough to say, "Well, everybody knows that rule," or, "We posted that rule 10 years ago." You may have to prove that the employee should have known of the rule.

Certain standards of conduct are normally expected in the industrial environment and it is assumed by arbitrators that employees should be aware of these standards. For example, an employee charged with intoxication on duty, fighting on duty, pilferage, sabotage, insubordination, etc., may be generally assumed to have understood that these offenses are neither condoned nor acceptable, even though management may not have issued specific regulations to that effect.

**Is the rule a reasonable rule?**

Management must maintain work rules by continually updating and reviewing them, and making sure that they are reasonable, based on the overall objective of safe and efficient work performance. Management's rules are reasonably related to business efficiency, safe operation of our business, and the performance we might expect of the employee, and this is known to the employee.

**Is the rule consistently and equitably enforced?**

If a rule is worthwhile, it is worth enforcing, but be sure that it is applied fairly and without discrimination.

Consistent and equitable enforcement is a critical factor, and claiming failure in this regard is one of the union's most successful defenses. The Postal Service has been overturned or reversed in some cases because of not consistently and equitably enforcing the rules.

Consistently overlooking employee infractions and then disciplining without warning is one issue. If employees are consistently allowed to smoke in areas designated as No Smoking areas, it is not appropriate suddenly to start disciplining them for this violation. In such cases, management loses its right to discipline for that infraction, in effect, unless it first puts employees (and the unions) on notice of its intent to enforce that regulation again.

Singling out employees for discipline is another issue. If several employees commit an offense, it is not equitable to discipline only one.

When the Postal Service maintains that certain conduct is serious enough to be grounds for discharge, it is unwise--as well as unfair--to make exceptions. If the Postal Service is to maintain consistency in its position that theft or destruction of deliverable mail is grounds for discharge even on a first offense, for example, then the otherwise good employee guilty of this offense, like the border-line or marginal employee, must be discharged.

**Was a thorough investigation completed?**

Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective.

This is the employee's day in court privilege. Employees have the right to know with reasonable detail what the charges are and to be given a reasonable opportunity to defend themselves before the discipline is initiated.

**Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?**

The following is an example of what arbitrators may consider an inequitable discipline: If an installation consistently issues 5-day suspensions for a particular offense, it would be extremely difficult to justify why an employee with a past record similar to that of other disciplined employees was issued a 30-day suspension for the same offense.

There is no precise definition of what establishes a good, fair, or bad record. Reasonable judgment must be used. An employee's record of previous offenses may never be used to establish guilt in a case you presently have under consideration, but it may be used to determine the appropriate disciplinary penalty.

The Postal Service feels that unless a penalty is so far out of line with other penalties for similar offenses as to be discriminatory, the arbitrator should make no effort to equalize penalties. As a practical matter, however, arbitrators do not always share this view. Therefore, the Postal Service should be prepared to justify why a particular employee may have been issued a more severe discipline than others.

**Was the disciplinary action taken in a timely manner?**

Disciplinary actions should be taken as promptly as possible after the offense has been committed."

**In conjunction with the tests of just cause,** the EL-921 and the JCIM, the most important tool the Union has at its disposal--and one of the least utilized in developing thorough, well-reasoned defenses vs. discipline--is our ability under Articles 17 and 31 of the Collective Bargaining Agreement to interview witnesses during the course of grievance investigations.

The Collective Bargaining Agreement states:

"**ARTICLE 17 - REPRESENTATION**

**Section 3.** Rights of Stewards

The steward, chief steward or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. **Such requests shall not be unreasonably denied**." (Emphasis added)

"**ARTICLE 31 - UNION-MANAGEMENT COOPERATION**

**Section 3.** Information

The Employer will make available for inspection by the Union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this

Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information."

**Utilizing our right to interview**, the questions the shop steward must ask of management are crucial if success is to be achieved through the grievance-arbitration process. Too often, Union advocates are faced with presenting cases in Arbitration in which the Union has not developed defenses addressing the tests of Just Cause. Too often, Union advocates do not know prior to the hearing what management witnesses and managers themselves will testify to at the hearing. Union interviews done at the earliest steps--prior to Steps 1 or 2--will enable the Union to address Just Cause as a structured requirement, not as a variable concept.

**Once interviews are conducted**, **these become invaluable elements of evidence**. Moreover, the steward becomes a valuable witness for the Union and can, at an arbitration hearing, refute a manager's changed story and seriously cripple a manager's credibility.

**The best way to develop solid defenses** vs. disciplinary actions is to specifically utilize the authority of Articles 17 and 31 for interviews in conjunction with the EL-921 and JCIM's Just Cause definition. The following is illustrative of how that process may proceed:

## EL-921/JCIM JUST CAUSE INTERVIEW QUESTIONS

### 1. Is there a rule?

- What is the rule?
- Is the rule posted in the Post Office?
- If yes, where is it posted?
- If yes, when was it posted?
- If yes, who posted it?
- If yes, were you present when it was posted?
- Was the rule related to the grievant by you?
- If yes, when?
- If yes, where?
- If yes, who else was present?
- Was the grievant informed of the rule when he/she was hired?
- If yes, were you present?
- If yes, who told you?
- How do you know if you weren't there and no one told you?

**2. Is the rule a reasonable rule?**

- Is this rule related to the job?
- Is that relationship stated within a regulation? Identify the regulation.
- Is this rule related to safe operations?
- Is that relationship stated within a regulation? Identify the regulation.
- What caused the creation of this rule?
- When was the last updating of this rule?
- When did you inform the grievant of this update?
- Who informed the grievant of this update?
- You don't know whether the grievant was informed of any update?

**3. Is the rule consistently and equitably enforced?**

- How many people have violated the rule?
- How often is it violated?
- How many employees have you disciplined for violating the rule?
- When was the last violation of the rule of which you are aware?
- When did you last issue discipline for a violation of the rule?
- Have you done a comparison of other employees' records who violated the rule?
- Did you consider the grievant's violation in comparison to others?
- Why haven't other employees received the same degree of discipline for similar infractions?
- Why haven't you issued discipline to others for similar infractions?

**4. Was a thorough investigation completed?**

*This question is covered in great detail in Chapters 2, 3 and 21.*

**5. Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?**

- Others have not received so severe discipline have they?
- Isn't the grievant's record very similar to others under your supervision?
- Doesn't employee Doe have more absences than the grievant and yet no discipline?

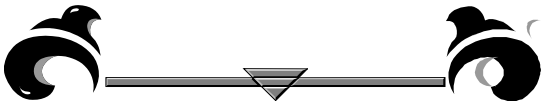
- Other employees were all issued letters of warning for this particular infraction, and the grievant was suspended?
- Doesn't the grievant's past record reflect no discipline?
- Did you check that past record?
- No employee has ever been fired for taking a break outside the building?
- The grievant is the first to be fired for that conduct?

**6. Was the disciplinary action taken in a timely manner?**

- The last absence you cited in the removal was May 5, 1997?
- You issued the removal on July 15?
- What new information came into your possession between May 5 and July 15?
- When did you make the decision to remove the grievant?
- When did your investigation begin? End?
- When did you initiate the removal?
- How is a delay of 71 days timely?

**The above illustrations** are not intended to be complete lists of every question a steward should ask. Each case will differ and will require development of strategically different questions. In any event, no disciplinary grievance must ever be processed without a detailed interview of the managers issuing discipline.

**When the steward composes the interview** questions and compiles them in writing, prior to the interview, with adequate space for responses and extemporaneously asked questions, the interview questionnaire should be developed using the format discussed above. Questions for each test should be placed under the test on the form. This will better enable the steward to keep track of the context--and under what just cause test--each question is asked.



**In our grievances**, it is important that we structure our contentions so they address each "test" or element of Just Cause. Listing the individual tests from the EL-921 and JCIM and how each test has been violated through due process will focus our arguments and create a further due process breach for management should management fail to address each "test" argument in its Step 2 grievance decision. We will argue that management is prevented from raising refutations at arbitration to our "test" arguments since they failed in their obligation to raise those refutations as per Article 15, Section 2, Steps 2d and f, at Step 2 of the Grievance/Arbitration procedure. Those provisions are as follows:

"**Article 15 - GRIEVANCE-ARBITRATION PROCEDURE**

**Section 2** Grievance Procedure Steps

**Step 2(d)** At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31. The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above.

**Step 2(f)** Where agreement is not reached the Employer's decision shall be furnished to the Union representative in writing, within ten (10) days after the Step 2 meeting unless the parties agree to extend the ten (10) day period. The decision shall include a full statement of the Employer's understanding of (1) all relevant facts, (2) the contractual provisions involved, and (3) the detailed reasons for denial of the grievance."

**Specific compartmentalization structuring of Just Cause tests**, interview questions and responses, and Union contentions/issues/arguments will move our disciplinary grievances from broad, general defenses to sharp, concrete due process issues. (The compartmentalization method is detailed within the Interviews as Evidence and Roadmap to Winning Strategy Books.)

The next chapters in this Handbook address those specific due process issues.

## MANAGEMENT ARGUMENT THAT THE EL-921 IS NOT AN OFFICIAL HANDBOOK UNDER ARTICLE 19

**The USPS often takes the position** that the EL-921 is only a guide, not an official Article 19 Handbook. To refute such an argument, the Union relies upon the following:

### 1. Directives and Forms Catalogue Publication 223.

**This USPS publication** lists all the USPS Handbooks and Manuals, including the EL-921. In addition, it includes two handbooks (the EL-401 and EL-501) which are not part of Article 19's Handbooks and Manuals.

**In a binding Step 4** interpretive decision, **H1C-NA-C 114,** dated October 1, 1984, the USPS and APWU agreed the EL-401, "Supervisor's Guide to Scheduling and Premium Pay", was not an Article 19 Handbook or Manual:

> "The issue in this case is whether management was proper in the manner under which EL-401 (Supervisor's Guide to Scheduling and Premium Pay) was issued.
>
> In final resolution of this grievance we agreed on the following clarification of the purpose and intent of EL-401.
>
> The EL-401 has no authority as a handbook or manual and should never be cited or referred to in any manner to support management's position with regard to scheduling and premium pay for bargaining unit employees."

**In a National level arbitration** case, **H8C-NA-C 61** dated December 27, 1982, Arbitrator Gamser determined that the EL-501, "Supervisor's Guide to Attendance Improvement", was not an official Article 19 Handbook or Manual:

> "This case was brought on for arbitration by the APWU, in a grievance subject to disposition at the National Level challenging the force and effect which the Postal Service allegedly bestowed upon EL-501, a publication entitled SUPERVISOR'S GUIDE TO ATTENDANCE IMPROVEMENT which was published in November of 1980.
>
> 1. The Employer shall promulgate an official document in which it clarifies the status of EL-501, making it clear that it is not to be regarded by management, the Unions, or employee covered by the National Agreement as a handbook having the force and effect of such a document issued pursuant to Article 19. Copies of such promulgation shall be furnished to the Unions concerned."

**The parties, through a Step 4 resolution** and a **National level arbitration decision** have determined that both the EL-401 and EL-501 are not Handbooks or Manuals under Article 19. There is no such Step 4 decision or National Arbitration decision excluding the EL-921 from Article 19. Absent such

authority and determination for the EL-921, and recognizing the EL-921's inclusion in the Directives and Forms Catalogue, the Union position is that the EL-921 is a binding Article 19 Handbook. When the USPS argues against the EL-921, we must put forth the Catalogue, the Step 4, the National Award, and Regional arbitral authority in support of the EL-921 as a binding Handbook under Article 19 of the Collective Bargaining Agreement.

## CHAPTER 2

# THE ISSUE: PREDISCIPLINARY INTERVIEW

*Including: Pre-Disciplinary Interview for Preference Eligible Employee, and Pre-Disciplinary Interview for Employee Discharged after a Last Chance Agreement.*

# THE DEFINITION:

**The Pre-Disciplinary interview** is the multi-element due process right of each employee to be:

1. Forewarned of the specific charge in the intended disciplinary action;
2. Forewarned of the degree and nature of the intended disciplinary action;
3. Presented with the alleged evidence the intended discipline is based upon;
   ***and***
4. Asked for his/her side of the story. This is the employee's "Day-in-Court".

# THE ARGUMENT(s):

**All the above** is required before the disciplinary action is initiated. Management must conduct a pre-disciplinary interview; that is, forewarn the employee that discipline is being contemplated, what that discipline is intended to be, the charge the discipline is based upon, the evidence supporting the intended discipline and ask the employee for his/her side of the story. Whether or not management utilizes a written request for discipline, the pre-disciplinary interview must be conducted prior to the initiation of any request for discipline. The request for discipline is the initiation of discipline.

***Must the pre-disciplinary interview be done in person?*** No. Management may conduct a pre-disciplinary interview over the telephone or even through correspondence, informing the employee of the charge, nature, and degree of the intended discipline and soliciting the employee's side of the story. However, if there is no in person interview, we must then argue that the employee has not been presented with the employer's evidence. This would be a procedurally defective pre-disciplinary interview.

A typical **pre-disciplinary interview** should be conducted as follows:

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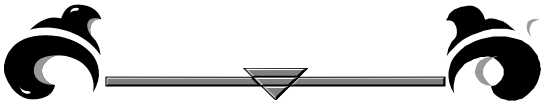
**Manager**: Mr. Doe, I am considering issuing you a Notice of Removal for "Failure to be Regular in Attendance." Your attendance record is as follows. This is your chance to respond to that intended action. I want any information you may have from your side of the story prior to making my final decision.

**In this manner**, management has forewarned the employee and solicited the employee's side of the story. If management conducts an "interview" with an employee immediately prior to issuing a disciplinary action, ie., at the same meeting in which the employee receives the disciplinary notice, then that is not a pre-disciplinary interview.

**As the manager already** has produced the Notice, discipline has already been initiated. To hold otherwise is both illogical and unreasonable. Pleadings from management that they had not yet made a final decision on issuance are irrelevant as the pre-disciplinary interview must occur prior to initiation, not issuance.



**THE PRE-DISCIPLINARY INTERVIEW**
**vs.**
**(OFFICIAL) DISCUSSIONS and INVESTIGATIVE INTERVIEWS**

**Managers often attempt** to misrepresent their obligations to a proper due process, pre-disciplinary interview by claiming that (official) discussions and/or investigative interviews are also pre-disciplinary interviews.

The following are distinctions between the three:

**OFFICIAL DISCUSSION**

Under **Article 16.2** of the Collective Bargaining Agreement, management has the responsibility to discuss minor offenses with employees with the purpose being to correct whatever behavior/deficiency the employee has demonstrated:

"**Article 16 DISCIPLINE PROCEDURE**

**Section 2.** Discussion

For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable."

A proper (**official**) **discussion** goes as follows:

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**Manager**: "Mr. Doe, this is an official discussion. The rule against being in the employee parking lot while on rest break is posted on the office's three bulletin boards. In addition, you were notified when hired of this prohibition. Last night, I had to call you into the Post Office from the parking lot while you were on your rest break. I am telling you that if this occurs again, I will be initiating disciplinary action against you.

If there is any problem I am unaware of or if I can assist you in any way to prevent this from happening again, please let me know now.

**That is an (official) discussion** which complies with the Collective Bargaining Agreement--provided it occurs in private between the supervisor and the employee. It is not disciplinary in nature nor is it a fact gathering exercise. It occurs after a minor offense by an employee not as a preemptive measure.

**INVESTIGATIVE INTERVIEW**

**Unlike a discussion**, an investigative interview is a fact gathering effort by management to investigate a situation prior to coming to any decision as to whether or not discipline should be initiated. Unlike a pre-disciplinary interview, the investigative interview does not forewarn an employee or solicit a response as to any intended discipline because the investigative interview occurs as part of management's fact gathering investigation. This is before any intent is established toward possible discipline.

An **investigative interview** goes as follows:

**Manager**: Mr. Doe, I have some questions concerning your presence in the parking lot last night.

- What time did you leave the building?
- What time did you return?
- For what purpose did you leave the building?
- What were you doing in the parking lot?
- Were you on rest break when you left the building?
- Who was with you?

**This is an investigative interview**--no forewarning or opportunity to respond to possible intended discipline.

**AN INVESTIGATIVE INTERVIEW AND A PRE-DISCIPLINARY INTERVIEW? YES!**

**Management has an obligation** to conduct a thorough, fair, and objective investigation prior to disciplining an employee. Investigative interviews, including an interview with a potential recipient of discipline, are essential elements of the aforementioned investigation process. The pre-disciplinary "day in court" forewarning and opportunity to respond follows the fact gathering investigation and is the last check and balance investigative step prior to initiation of discipline.

# THE COLLECTIVE BARGAINING AGREEMENT

Article 19's EL-921 Handbook, "Supervisor's Guide to Handling Grievances", defines Just Cause under the Collective Bargaining Agreement. Within that definition, management's obligation to conduct a pre-disciplinary interview exists as follows:

**Was a thorough investigation completed?**

Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective.

This is the employee's day in court privilege. Employees have the right to know with reasonable detail what the charges are and to be given a reasonable opportunity to defend themselves before the discipline is initiated."

**JOINT CONTRACT INTERPRETATION MANUAL - ARTICLE 16.1**

**JUST CAUSE PRINCIPLE**

These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

**Was a Thorough Investigation Completed?**

Before administering the discipline, management should conduct an investigation to determine whether the employee committed the offense. The investigation should be thorough and objective.

The investigation should include the employee's "day in court privilege." The employee should know with reasonable detail what the charges are and should be given a reasonable opportunity to defend themselves before the discipline is initiated.

# THE INTERVIEW

**Crucial in establishing** the fact that no pre-disciplinary interview was conducted is our own interview of the manager responsible for the initiation of the discipline. The following are illustrations of how such an interview may proceed:

- Did you initiate the discipline against Mr. Doe?
- When did you decide to initiate that discipline?
- Did you submit a written request for discipline?
- When?
- To whom?
- Between the last absence cited in the Notice of Removal and the date you submitted your written request for discipline, did you meet with employee Doe?
- Did you call employee Doe at home to discuss the possibility of discipline with him/her between the last absence you cited and your submission of the request for disciplinary action?
- Did you write to employee Doe regarding the possibility of discipline with him/her between the last absence cited and your submission of the request for disciplinary action?
- Did you have any contact with employee Doe regarding the possibility of discipline between the last absence cited and your submission of the request for discipline?
- The first contact you had with employee Doe regarding this removal for the charge you included was when you gave him the Notice of Removal?

**In this manner**, the steward establishes that no pre-disciplinary interview was conducted. Notice that at no time were overly obvious questions asked such as, "Did you conduct an investigation?", "Did you conduct a pre-disciplinary interview?", "Aren't you required to conduct a pre-disciplinary interview?" Obvious questions will generate obvious responses which are, at best, other than useful ones, or worse, harmful for the steward's purpose. The steward must skillfully craft the questions so as to illicit responses supporting our arguments. The steward must orchestrate the interview through careful planning of the questions and in preparation for various responses.

**For example**, should the manager being interviewed answer that a pre-disciplinary interview has been conducted, then the steward must have detailed questions prepared to test the manager as to the veracity of that answer. Such questions may go as follows:

- During your interview, you told employee Doe the intended charge. What was it?
- During the interview, you told employee Doe the intended degree of discipline.
- What was it?
- During the interview, did employee Doe tell you anything regarding those absences?
- If so, what?
- During the interview, you presented intended evidence to employee Doe for his response?
- What was the evidence?
- Did you receive any information from employee Doe regarding any of these absences during the interview?
- Where was the interview held?
- When was the interview held?
- Who else was present?
- How long did the interview last?

**These questions** and answers will serve as evidence at Step 2 of the Process. Should the USPS not provide rebuttal evidence at Step 2, our evidence will stand alone. They will also limit later deviations should arbitral testimony occur from the manager. If the manager does deviate, then serious credibility breaches will occur. In addition, the interview and eventual arbitral testimony of the grievant (and steward if one was present during the pre-disciplinary interview) can refute the testimony of the manager, even when the manager does meet with the employee in a pre-disciplinary setting. Should the manager not forewarn the employee of the intended detailed charge and the nature/degree of the discipline and present the intended evidence and solicit the employee's "side of the story", that exercise is not a proper pre-disciplinary interview.

**The questions previously included** are examples of suggested questions for stewards. Each steward must rely upon his/her own intuition, knowledge of particular fact circumstances, individual personalities, and history to develop questions which will best result in answers most useful in proving management violated its obligation to the pre-disciplinary interview as due process.

# THE U.S. SUPREME COURT

**The United States Supreme Court** has embraced the principle of the pre-disciplinary interview as required due process when an employee may be disciplined. In Case No. 470 U.S. 532, Justice White, speaking for the majority, stated:

***Justice White Supreme Court of the United States 470 U.S. 532***
***Cleveland Board of Education v. Loudermill et al Pages 9-10, 12, 13***

"An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). We have described "the root requirement of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." in Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (emphasis in original); see Bell v. Burson, 402 U.S. 535, 542 (1971). This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. Board of Regents v. Roth, 408 U.S., at 569-570; Perry v. Sindermann, 408 U.S. 593, 599 (1972). As we pointed out last Term, this rule has been settled [***19] for some time now. Davis v. Scherer, 468 U.S. 183, 192, n. 10 (1984); id., at 200-203 (BRENNAN, J., concurring in part and dissenting in part). Even decisions finding no constitutional violation in termination procedures have relied on the existence of some pretermination opportunity to respond.

First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. See Fusari v. Steinberg, 419 U.S. 379, 389 (1975); Bell v. Burson, supra, at 539; Goldberg v. Kelly, 397 U.S. 254, 264 (1970); Sniadach v. Family Finance, Corp., 395 U.S. 337, 340 (1969). While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job. See Lefkowitz v. Turley, 414 U.S. 70, 83-84 (1973).

Second, [***21] some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Cf. Califano v. Yamasaki, 442 U.S. 682, 686 (1979). Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect. See Goss v. Lopez, 419 U.S., at 583-584; Gagnon v. Scarpelli, 411 U.S. 778, 784-786 (1973). N8

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. (Underscoring added)

We conclude that all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination [*548] administrative procedures as provided by the Ohio statute. Because respondents allege in their complaints that they had no chance to respond, the District Court erred in dismissing for failure to state a claim. The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion."

# THE ARBITRATORS

Arbitral authority is extensive and very useful in support of the APWU position that a pre-disciplinary interview is a mandatory requirement of due process in disciplinary instances. Many arbitrators now embrace the EL-921 and incorporate reference to the Handbook in their decisions. In many of the arbitration decisions cited below, but for the due process violation of no pre-disciplinary interview, the arbitrator would have upheld the discipline and denied the grievance. Those decisions are as follows:

***Arbitrator Christopher E. Miles*** ***Case No. E90C-2E-D 92033059 & 92033062***
***Scranton, PA*** ***July 14, 1993*** ***Pages 21-23***

"The Union has asserted that the Postal Service, prior to taking the removal action herein, did not conduct a thorough and objective investigation, including a pre-disciplinary interview. The Letter of Removal issued by Supervisor Pleban, provides that, "In March, 1992, while working with Joanne Gouldsbury, you asked her if she was interested in purchasing insurance plans for her son's college education. You discussed various plans and then asked if you could go to her residence to discuss the plans further. In May, you followed up on this initial contact by calling Ms. Gouldsbury on the telephone at her residence." In this respect, the evidence reveals that Ms. Pleban was supplied with a statement from Ms. Gouldsbury by Postmaster Primerano and Mr. McNamara. However, there was no testimony to establish that Mr. McFarlane was ever confronted with the statement or the fact that Ms. Gouldsbury had made such a charge in order to have his side of the story, prior to the Letter of Removal being issued. Even at the meeting conducted by Postmaster Primerano, he confirmed that Ms. Gouldsbury's name was not mentioned and her statement was not shown to the grievant. It seems fundamentally unfair that the grievant was not permitted to respond to the specific allegation made by Ms. Gouldsbury prior to the Letter of Removal being issued. It would not have only been fair, but proper to get the grievant's version for consideration prior

to the issuance of discipline in order to be objective. In this regard, reference is made to the EL-921 Handbook, which other arbitrators have held is incorporated into the Agreement by Article 19. Therein, it is suggested that the supervisor should give an employee an opportunity to explain their side. It is indicated that, "Employees have the right to know with reasonable detail what the charges are and be given a reasonable opportunity to defend themselves before the discipline is initiated." ***

Here, the record fails to establish that there was any pre-disciplinary interview conducted by Supervisor Pleban prior to issuing the Letter of Removal. Thus, Mr. McFarlane was denied the opportunity to be confronted with the specific allegation made by Ms. Gouldsbury prior to taking the removal action. Furthermore, even during the meeting conducted by Postmaster Primerano, such information was not brought out according to the testimony. Therefore, it is my considered opinion that the grievant was denied his due process rights in this regard."

***Arbitrator Joseph S. Cannavo, Jr.*** ***Case No. A90C-1A-D 95020409***
***Hackensack, NJ*** ***January 17, 1997*** ***Pages 16-20***

"The Arbitrator also finds that another element of just cause was not proven by the Postal Service, that being that a thorough investigation be conducted prior to the issuance of the discipline. This discipline was a matter of attendance. It is a relatively simple matter and any investigation whatsoever would not be burdensome. In order for an investigation to be complete, it is essential, for the most part, that the Grievant be given an opportunity to give his side of the story. Just cause requirements expect and demand this where possible. Even the EL-921 which the Postal Service Advocates disavow upon its appearance on the hearing table calls for this "day in court" prior to the issuance of the discipline. This Arbitrator has consistently held that he need not rely on the contents of the EL-921 because the elements of just cause provide the guidance necessary to establish whether discipline was properly issued. The supervisor was not contemplating a Letter of Warning or a seven (7) or fourteen (14) day suspension. She was contemplating the issuance of industrial capital punishment. As such, she had an obligation to get the Grievant's side of the story.

***The Grievant testified that the first time he learned of the removal action was on the day that he signed it, October 26, 1994. On rebuttal, the supervisor testified that she gave the Grievant a predisciplinary interview on October 24, 1994. The Union argues that if an interview was conducted on October 24, 1994 and the discipline issued on October 26, 1994, then the decision to remove the Grievant was made prior to October 24, 1994. This may be true. However, the Arbitrator finds the following argument even more persuasive: at both Steps 2 & 3 of the grievance procedure, the Union alleged that the Grievant was not given a predisciplinary interview. No reference is made to this charge in the Steps 2 & 3 decision letters. The Postal Service had ample opportunity to rebut this contention during the grievance procedure. It was not a new issue raised by the Union at arbitration. As such, the Service's silence during the grievance procedure must speak louder than the supervisor's rebuttal testimony. Further, if the supervisor had given the Grievant a predisciplinary interview, she should have informed the Ad-

vocate for the Postal Service of this during preparation for the arbitration. If this were done the Arbitrator is assured that this most highly skilled and thorough Advocate would have included such testimony in the Service's case in chief because it is an essential element of just cause.

***The failure of the supervisor to provide a thorough investigation and a predisciplinary interview prevented the Advocate for the Postal Service from meeting the burden of proof that just cause demands."

***Arbitrator Irwin J. Dean, Jr.*** ***Case No. E90C-2B-D 92034341 & 92034343***
***East Camden, NJ*** ***April 29, 1993*** ***Pages 16-19***

"Although the Seitz Award clearly indicates the propriety of the Service's reliance on Postal Inspection Service reports in forming disciplinary decisions, the Arbitrator must agree with the Union that an Inspection Service investigation or report is not a sufficient basis in itself upon which to rest a disciplinary decision. As the Union correctly observes, a component of due process which is required both by the parties' collective bargaining agreement and by the Supervisor's Guide to Handling Grievances is that Postal management must conduct its own investigation which must include providing an employee who may be disciplined an opportunity to explain his version of the underlying circumstances, including any mitigating factors which may be present

> *Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective.*
>
> *This is the employee's day in court privilege. Employees have the right to know with reasonable detail what the charges are and to be given a reasonable opportunity to defend themselves before the discipline is initiated.*

Supervisor's Guide to Handling Grievances, Handbook EL-921, (August 1990) at p. 18. The importance of soliciting an employee's version of events before imposing discipline is to avoid precipitous supervisory action. Moreover, because management's position may well become galvanized if it does not determine all of the relevant facts prior to issuing a disciplinary decision, the fact that a Grievant may subsequently present his version of events through the grievance and arbitration procedure is not a sufficient substitute for allowance of a pre-disciplinary interview or explanation."

In this case, the Grievant's supervisor candidly admitted during her testimony that she did not attempt to interview the Grievant prior to forming her decision to discharge him through the issuance of the January 2, 1992 Removal Notice. As numerous arbitrators, including each of the authors of the decisions cited above, have concluded, a discharge simply cannot stand unless the supervisor has complied with the express, mandatory obligation to provide the Grievant with an opportunity to be heard. While the Service may rely to some extent on reports of interviews conducted by Postal Inspection Service officials, the decision to discharge is essentially a supervisory function. Indeed, the

cover letter on the December 2, 1991 Postal Inspection Service report cautions that "[t]he Inspection Service is not authorized to make decisions concerning discipline or administrative actions." Under the Supervisor's Guide to Handling Grievances, the responsibility to discipline is squarely placed upon the supervisor who must acquaint herself with the pertinent facts, and must independently offer the Grievant an opportunity to explain and to state any basis for mitigating discipline which might be under consideration."

## THE ISSUE: PRE-DISCIPLINARY INTERVIEW FOR PREFERENCE ELIGIBLE EMPLOYEE

## THE ARGUMENT

**Under the umbrella** of the pre-disciplinary interview due process requirement is the sub-issue of the pre-disciplinary interview for an employee who receives a Notice of Proposed Removal followed by a Letter of Decision. Under the Veterans' Preference Act, a Preference Eligible employee must be given a Notice of Proposed Removal including notification of the opportunity to respond to the final decision-maker within 10 days of the Notice of Proposed Removal. These due process requirements are often misinterpreted by management into a belief that because the preference eligible employee gets the chance to respond before the Letter of Decision there is no need for a pre-disciplinary interview. This is absolutely incorrect.

**The preference eligible** employee is afforded the same rights as all other employees insofar as the required pre-disciplinary interview is concerned. The supervisor who decides whether or not to initiate discipline must seek the employee's side of the story prior to initiation. Thereafter, through the MSPB process for preference eligibles, there is yet another chance to respond following initiation and issuance of the proposed action.

## THE ARBITRATORS

**Should management fail** to conduct a pre-disciplinary interview prior to initiation, the employee's due process rights are violated. Arbitrator Baldovin's explanation in Case No. G90C-1G-D 95075476 said it best:

***Arbitrator Louis V. Baldovin, Jr.*** ***Case No. G90C-1G-D 95075476***
***Amarillo, TX*** ***August 21, 1996*** ***Pages 2-7***

"This matter appears to be a case of first impression. It is a removal case involving a preference eligible veteran. The Union's threshold position is that the removal is procedurally defective because Grievant was not given a pre-d prior to the issuance of the Notice of Proposed Removal. The Service takes the position that a preference eligible is not entitled to a pre-disciplinary interview, that a preference eligible employee is provided his day in court after the issuance of the Notice of Proposed Removal and before the discharge becomes effective pursuant to the determination of the representative of

the Service designated as the decision maker for MSPB purposes. In this case, the Plant Manager was designated and Grievant had an opportunity to respond to the charges in the Notice of Proposed Removal within 10 days from issuance thereof. Therefore, according to the Service, Grievant had his day in court and had his opportunity to tell his side of the story before discipline was imposed. The Service argues that the pre-d, the day in court, the opportunity for a non veteran to tell his side of the story is provided to a non veteran employee before issuance of a Notice of Removal because a Notice of Removal constitutes the imposition of discipline and is not merely a proposal as in the case of a Notice of Proposed Removal issued to a preference eligible. I disagree for the following reasons. ***

***The Service does not dispute the fact that an employee (at least a non veteran preference eligible) is, normally and absent unusual circumstances, entitled to his/her day in court, entitled to a pre-d interview, entitled to tell his/her side of the story prior to the submission of a Request for Discipline. If not, the degree of discipline proposed would arguably have been predetermined, making the pre-d, the employee's day in court, listening to his side of the story, a sham. It cannot be said that an employee's side of the story has been given any consideration by the supervisor if the degree of discipline proposed by the supervisor is determined in advance of the pre-d. With respect to the bottom line in this case, viz..., when should an employee have his day in court, his chance to be heard, his pre-d, I conclude whether a preference eligible or not, a pre-d must be held prior to proposing discipline because it is an integral part of the factors leading to a proper assessment of the degree of discipline to be proposed, if any, for approval by appropriate higher authority. The fact that Grievant was not given a pre-d prior to the issuance of the proposal to discharge him in my opinion constitutes harmful error and a denial of due process and in such circumstances just cause cannot be established."

***Arbitrator Jacquelin F. Drucker*** ***Case No. C90T-1C-D 95034191***
***Lehigh Valley, PA*** ***April 11, 1996*** ***Pages 23-25***

"1. The Pre-Disciplinary Interview

***The USPS does not contend that it may dispense with the pre-disciplinary interview but argues instead that Grievant actually had two opportunities to present his side of the story: one during his conversation with Supervisor Junius in the supply room and a second, which he did not take, after issuance of the Notice of Proposed Removal (NOPR). Neither of these "opportunities" constituted an adequate pre-disciplinary interview.

The arbitrator rejects the sufficiency of the post-NOPR opportunity for two reasons. First, the issuance of the Notice of Proposed Removal is the grievable event under Article 15 of the National Agreement. (See Memorandum of Understanding Between the United States Postal Service and the American Postal Workers Union, dated July 31, 1991, and August 12, 1991.) Thus, once the NOPR has been issued and a grievance has been filed, any subsequent interactions occur under the auspices of the grievance mechanism and can no longer be considered pre-disciplinary. Second, as emphasized by the

USPS, the actual decision to seek removal is made by the supervisor. The supervisor is the deciding officer, whose judgment, although subject to review, is central to the employee's future. It therefore is this person who must hear from the employee regarding discipline for before a determination is made. Thus, this opportunity to reply to the NOPR did not present Grievant with the chance for a pre-disciplinary interview as contemplated by the principles of just cause and due process.

***A meaningful pre-disciplinary interview involves more than simply asking the employee what happened. The employee needs to know that discipline, especially removal, is being contemplated and be permitted to respond to the possibility that such discipline may result. The employee needs to know this so that he not only may provide information and a defense but also so that he may cite relevant mitigating factors and may seek union advice and representation. The record does not establish to the arbitrator's satisfaction that Grievant was made aware that discharge or any form of serious discipline was being contemplated. It also is questionable whether a pre-disciplinary interview could be meaningfully conducted within minutes of a highly emotional dispute. Under these circumstances, the Grievant was ill-prepared to collect his thoughts regarding mitigating factors or to seek guidance as to his defense. These factors, taken together, render the interview of Grievant in the supply room wholly insufficient as a pre-disciplinary session and draw the propriety of discharge into question."

## THE ISSUE: **PREDISCIPLINARY INTERVIEW FOR EMPLOYEE DISCHARGED AFTER LAST CHANCE AGREEMENT.**

## THE ARGUMENT

**Most arbitrators support** the position that once an employee is retained under a Last Chance Agreement that employee trades normal Just Cause protection against future discipline for that last and final opportunity to be an employee. Many arbitrators believe that trade-off would relieve management of its pre-disciplinary interview obligation. However, there are several arbitrators who have held that even removal following a last chance requires the basic due process of a pre-disciplinary interview. For that reason, we must advocate our due process argument that a last chance agreement does not negate the pre-disciplinary interview as a basic due process requirement.

# THE ARBITRATORS

**The arbitration decisions** in our favor are as follows:

***Arbitrator Linda DiLeone Klein*** ***Case No. C90C-1C-D 93036857***
***Lancaster, PA*** ***February 11, 1994*** ***Pages 7-8***

"Although the grievant had been disciplined in the past for attendance infractions and although she had voluntarily participated in the last chance settlement, she was not thereby excluded from basic due process rights. The Postal Service is required to establish that it had just cause for discharge even though she was in a last chance status; included in the definition of just cause is the grievant's right to be afforded a reasonable opportunity to be heard prior to the issuance of discipline. The procedural safeguards of "just cause" are not eliminated or negated by the last chance agreement. The denial of a chance to be given a "day in court" before the removal notice was issued must be viewed as a breach of procedure which adversely affected the grievant's right to due process. While the grievant had every opportunity to challenge certain absences during the grievance procedure, the denial of the opportunity to do so prior to the issuance of the Notice of Removal constitutes a substantial flaw in procedure.

Based upon the failure to hold a pre-disciplinary interview, the grievant must be reinstated. Having reached this decision, the Arbitrator is not hesitant to state that the grievant's record of unscheduled absences is such that, absent the procedural error, the position of Management would have been sustained."

***Arbitrator Jacquelin F. Drucker*** ***Case No. C90C-1C-D 95017099***
***Reading, PA*** ***May 17, 1996*** ***Pages 7-11***

"This discharge was effected under the terms of a last-chance agreement ("LCA"), the validity of which has not been challenged. The LCA sets forth no alteration of the fundamental principles or requirements of due process, and the burden of establishing just cause under the terms of the LCA rests with the USPS. See USPS, Southfield Michigan and APWU (Jayson), Case No. C1C-4B-D-21335 (L. Klein, 1993); Dept. Of Highway Safety and FOP/OLC, 96 LA 71 (Dworkin, 1990). Management cited and presented several relevant awards, one of which indicates that, under an LCA, just cause principles do not apply and are supplanted by the terms of the LCA. The predominate view, and the view of this arbitrator, however, is that even the (sic) under the limitations of an LCA, a proper discharge must meet basic elements of fairness (i.e., "limited just cause"), which include inquiry into the infraction alleged, some proof that the infraction occurred, and an opportunity for the employee to be heard, to explain, and to defend. Exxon Co. and Employees Federation, 101 LA 997 (Sergent, 1993). It is this latter element that is problematic and dispositive in this case.***

***In the instant case, Management concedes that no effort was made to arrange a pre-disciplinary interview. There is no evidence to suggest that the Grievant was unavailable. In fact, the attendance records (Form 3972, Joint Exhibit #4) indicate that Grievant was on the job, with no absences or tardiness during the two (2) weeks prior to issuance of the Notice of Removal.

Given this breach of fundamental due process, the Grievant must be reinstated. The arbitrator recognizes that Grievant has an attendance record which, even taking the shortcomings of the documentation into consideration, clearly does not meet the terms of the LCA. Were it not for the violation of due process rights that remain even under the specter of this LCA, the removal would be upheld. Given this situation, back pay is inappropriate, as is unconditional reinstatement. Accordingly, the Grievant's reinstatement will be subject to the terms of paragraph 4 the last chance agreement dated November 17, 1993."

## CHAPTER 3

# THE ISSUE: <u>INVESTIGATION PRIOR TO DISCIPLINE</u>

# THE DEFINITION

Management must conduct a thorough, fair, and objective investigation prior to initiating disciplinary action.

# THE ARGUMENT

One of the areas of Just Cause in which the Union is particularly successful is the failure of Management to meet its obligation to conduct a fair, thorough, and objective investigation prior to initiating discipline. Management must establish the facts not through presumption or assumption or reliance on other investigations. The supervisor who initiates discipline through a written request for discipline or drafts a disciplinary notice without such a request is the manager responsible for having investigated prior to the initiation.

Checking records, reviewing statements and documents, interviewing witnesses, reviewing video tapes or photographs, listening to audio recordings, these are all possible elements of a supervisor's investigation. Many times, a supervisor does a minimal--at best--review of the situation which may include almost no first-hand investigation. When this occurs, that supervisor has violated one of the most basic, and important, due process rights of an employee subject to discipline.

When management fails to uncover evidence and facts related to circumstances which result in discipline, they clearly fall short in their Just Cause obligation. However, the efforts management employs to attempt to uncover evidence and facts is extremely important to our Just Cause defense--no matter what those efforts would or would not have revealed.

Perhaps an employee is removed for sexual harassment of a customer. That removal is based upon a written letter received from the customer. In addition, the supervisor receives two letters from two other customers seemingly corroborating the first customer's letter. The supervisor fires the employee based upon the three letters. If the supervisor did not personally speak with those three customers whose letters he is relying upon to impose removal, then the investigation is inadequate and does not meet the Just Cause requirement. That supervisor had an obligation to contact and inquire. That is the "thorough" obligation. It is not enough to simply read letters and rush to judgement. Perhaps discussion with the three customers would have fully supported the letters and the action. No matter, the failure to thoroughly establish the facts renders the investigation less than what is necessary to prove Just Cause.

When arguing no Just Cause exists due to lack of a thorough, fair, and objective investigation, the steward must construct every avenue the supervisor could have, and reasonably should have, explored prior to initiating discipline. All the documents, records, video/audio tapes, witnesses, etc., that could have and should have been reviewed and interviewed prior to a decision must be listed by the steward in the context of a management obligation to leave no stone unturned in the investigation. This is the only way to establish the supervisor's investigation does not meet the requirements of Just Cause.

**OFFICE OF INSPECTOR GENERAL/POSTAL INSPECTION SERVICE INVESTIGATIONS AS SUBSTITUTES FOR MANAGEMENT**

Increasingly, arbitrators are supporting the Union contention that total reliance by management on the Office of Inspector General/Postal Inspection Service Investigative Memorandum for investigative purposes--prior to discipline--falls short of management's investigatory obligations. Since the OIG/Postal Inspection Service is not permitted to recommend, request, initiate, or issue discipline, they cannot be a proper substitute for management. The EL-921, "Supervisor's Guide to Handling Grievances", specifically requires that management conduct the investigation. This is not to say that an OIG/Postal Inspection Service Investigative Memorandum cannot be an element of a management investigation--it can and often is. But it is to say that an OIG/Postal Inspection Service Investigative Memorandum cannot solely be the only element of investigation management substitutes for its own. Since management has the responsibility for discipline in the Collective Bargaining Agreement, it is management that must decide whether all the facts and all the evidence and all existing mitigating factors result in a disciplinary decision and the degree of that decision.

# THE COLLECTIVE BARGAINING AGREEMENT

Article 19's EL-921, "Supervisor's Guide to Handling Grievances", contains much useful language as to Management's investigatory obligations:

> **"Was a thorough investigation completed?**
>
> Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective.
>
> **D. Disciplinary Arbitration**
>
> When conducting the investigation before disciplining an employee, the supervisor should gather all available and relevant evidence that will help to prove the case. This information is frequently available in the form of official records. For instance, if the charge involves tardiness, a copy of the employee's time card showing the arrival time might be introduced. On any attendance-related charge, Forms 3971, 3972, etc., would be relevant. When available, this type of documentation should accompany the supervisor's request for formal discipline.

We realize that documentary evidence is not always available. For example, if an employee fails to comply with the oral instructions of the supervisor, no written documentation of the offense is likely to be available. In an incident such as this, the supervisor should be able to explain clearly and corroborate in detail his or her version of the incident. If there were witnesses to the incident, the supervisor should record their names.

**E. Investigation**

As previously discussed, when an employee commits an offense which seems to warrant discipline, the supervisor must avoid rushing into a disciplinary action without first investigating. The need for an investigation to meet our just cause and proof requirements is self-evident. However, the employee's past record must also be checked before any disciplinary action is considered. This is obviously necessary if we are to abide by the principle of progressive discipline.

**F. How Much Discipline**

Items for consideration in assessing discipline include but are not limited to:

The nature and seriousness of the offense.

The past record of the employee; and/or other efforts to correct the employee's misconduct.

The circumstances surrounding the particular incident.

The amount of discipline normally issued for similar offenses under similar circumstances in the same installation.

The length of service.

The effect of the offense upon the employee's ability to perform at a satisfactory level.

The effect the offense had on the operation of the employee's work unit; for example, whether the offense made coverage at the overtime rate necessary, whether mail was delayed, etc."

**JOINT CONTRACT INTERPRETATION MANUAL- ARTICLE 16.1**

**JUST CAUSE PRINCIPLE**

These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

**Was a Thorough Investigation Completed?**

Before administering the discipline, management should conduct an investigation to determine whether the employee committed the offense. The investigation should be thorough and objective.

The investigation should include the employee's "day in court privilege." The employee should know with reasonable detail what the charges are and should be given a reasonable opportunity to defend themselves before the discipline is initiated.

# THE INTERVIEW

As previously stated, the steward must establish all the information which should have and could have been explored by the supervisor in management's investigation. Moreover, the higher level reviewing and concurring official also has an obligation to at least review what the supervisor investigated. Many of the question examples below can and should also be asked of the higher level reviewing and concurring official in that context: "Did Supervisor Jones contact Dr. Miles prior to initiating the Notice of Removal?", "Did you ask Supervisor Jones whether or not he contacted Dr. Miles prior to initiating the Notice of Removal?" In this way, we are establishing what investigation the higher level reviewing and concurring official made as part of his required review.

Examples for the supervisor are as follows:

- Did you review the 3971s?
- You were aware the 3971s were not completed properly?
- You were aware the 3971s did not reflect scheduled/unscheduled?
- You were aware the 3971s were not signed by management?
- You were aware the 3971s were neither checked approved nor disapproved?
- You were aware the 3971s were designated FMLA?
- You were aware the 3972 listed disciplinary actions and official discussions on the form?
- You were aware each absence you cited in the removal notice was documented with a medical certificate?
- You were aware the past elements of discipline were not yet adjudicated?
- You were aware the past elements of discipline had been modified?
- You were aware the past elements of discipline had been expunged?

- You did not interview the Postal Medical Officer prior to initiating the Notice of Removal?
- You did not attempt to interview the Postal Medical Officer prior to initiating the Notice of Removal?
- You did not interview the grievant's personal physician prior to initiating the Notice of Removal?
- You did not call the grievant's personal physician to attempt an interview prior to initiating the Notice of Removal?
- You did not interview the customer who wrote the letter of complaint prior to issuing the Notice of Removal?
- You did not attempt to contact that customer prior to initiating the Notice of Removal?
- You did not attempt to contact any of the other customers prior to initiating the Notice of Removal?
- You did not review the video tape prior to initiating the Notice of Removal?
- You did not attempt to review the video tape prior to initiating the Notice of Removal?
- You did not review the audio tape prior to initiating the Notice of Removal?
- You did not attempt to review the audio tape prior to initiating the Notice of Removal?
- You did not interview the Postal Inspection Service prior to initiating the Notice of Removal?
- You did not contact the Postal Inspection Service to attempt to interview them prior to initiating the Notice of Removal?
- You did not interview the grievant prior to initiating the Notice of Removal?

The list can go on and on. We must establish not only that the investigation did not occur, but that no investigation was attempted. Many times only a small portion of the potential investigation may have been attempted or have occurred. It is still important to clearly establish what did not. And each question can and should be asked of the alleged reviewing and concurring official to determine whether that individual fulfilled the "check and balance" role.

Without the interview, the steward can expect - and the advocate will be faced with glowing accounts by supervisors and higher level managers of the thorough extent of their "investigation". While some of this testimony - as evidence - will be refuted, too many times that testimony stands because no interviews exist by the Union to establish the facts and prevent management's re-creation at arbitration.

# THE ARBITRATORS

Arbitral reference on management's obligation to investigate and management's reliance solely on the Postal Inspection Service Investigative Memorandum is extensive:

| | | |
|---|---|---|
| ***Arbitrator Randall M. Kelly*** | | ***Case No. A90C-4A-D 94016391*** |
| ***Island Heights, NJ*** | ***November 7, 1994*** | ***Pages 7-14*** |

While arbitrators are not unanimous, there now appears to be a consensus of opinion that a supervisor cannot rely solely on an Investigative Memorandum in making his or her disciplinary decision. And, viewing Frey's "investigation" in the context of the overall investigation by management, it is clear that her sitting in on the interview by the Postal Inspectors alone was not sufficient to justify the action taken.

***Here, the Grievant was videotaped on August 27 and interviewed on August 31 on the basis of the videotape alone. This was the only time prior to the arbitration that Frey viewed the videotape or interviewed the Grievant. She was placed in Emergency Off-Duty Status the next day. At this point, Frey's independent investigation was essentially over.

Then, the first audit of her flexible account showed an overage. A second audit on September 14 and 15 showed a shortage. The Postal Inspectors were unable to find any further evidence against the Grievant and issued their IM on October 15; it was received by Frey on the 16th or 17th (there is no explanation in the record why it took so long to issue the IM). Still, she did not interview the Grievant after receiving the IM (the basis for the decision to discharge) and before issuing the Notice of Removal on November 1. Frey did not even review the videotape at that time. And, significantly, it is unrebutted that the concurring official, Tony Rosario, never viewed the videotape (Meiners' interview of Rosario dated December 13 (U. Exh. 7). And, between August 31 and November 1 Frey did not interview the Grievant for her side of the story, nor did Frey feel it necessary to review the videotape during those two months. When discharging an employee for theft, this is simply not sufficient.

As an example of what Frey should have explored, there was a time difference of seven minutes between the Emergency Placement in Off-Duty Status (1625 hours) and the Notice of Removal (4:32 p.m.). Later, the Union argued that the Grievant and the Union officers were shown a segment from approximately 4:25 when they saw the tape on August 31, but that the Service relied on a segment at approximately 4:32 for the Removal action. The seven minute discrepancy was contained in the documents available to Frey before the Notice of Removal was issued, she could have investigated this.

"It is clear from these decisions that an investigation of a possible violation of Postal laws and regulations by the Inspection Service is not in any way an acceptable substitute for the immediate supervisor's own inquiry into the equities of the case. To a Postal Inspector, an employee with thirty years service and a dozen superior performance awards who steals a 22 stamp is simply a thief who has misappropriated Postal property. It is entirely proper for the Inspector to look at it this way. But the supervisor, in deciding whether to take corrective disciplinary action, must consider not only the offense but also all mitigating and extenuating circumstances and the likelihood that the employee can be rehabilitated into a productive and trustworthy member of the Postal team. It may be true that some supervisors lack the experience and mature judgment to reach a just and fair decision as to what should be done, but this fact does not mean that the supervisor may abdicate his or her own responsibility and pass the buck to the Inspection Service.

I am reluctant to restore a dishonest employee to a position of trust with the Postal Service, but the Union properly raised the issue of harmful error at Step 2 and the employer has simply failed to address it. Not a single citation on the point was offered. I may not ignore requirements which numerous arbitrators have found implicit in Article 16 of the National Agreement in order to uphold the fatally tainted disciplinary action on some vague notion of public policy. In this respect, I am specifically guided by the principles announced by Judge Harry Edwards (a former distinguished arbitrator himself) for the Court of Appeals for the District of Columbia in American Postal Workers Union v. U.S. Postal Service, 789 F.2d 1 (1986)."

***Arbitrator John C. Fletcher*** ***Case No. C0C-4M-D 09549 & 12003***
***Flint, MI*** ***February 13, 1992*** ***Pages 14-16***

"The second reason why the discipline is flawed is the failure of Grievant's supervisors to conduct there (sic) own inquiry into the matter before issuing discipline. It is recognized that there are two lines of arbitral authority on this issue. This Arbitrator finds that the line of authority that requires a supervisor to conduct at least some type of independent investigation instead of merely relying on the contents of an Investigative Memorandum, to be the better reasoned decisions and more in harmony with the due process requirements of the Agreement. In this regard see S4C-3S-D 5303, Marlatt, Arb., (1987), and the awards mentioned therein, as well as S7C-3D-D 3801, Gold, Arb., (1992), where it is stated:

> Any Supervisor who relies solely on the findings of the Inspection Service does so at his or her own peril. Postal Management has the responsibility of conducting a full investigation of any actions that may result in the assessment of discipline. An IS report is just one element or factor that must be weighed and it cannot be presumed to be accurate or true without independent analysis.

Further in this regard it is noted that the award in AB-E-1057-D, Dash, Jr., Arb., (1974), references a September 13, 1973 IMPLEMENTATION OF MEMORANDUM OF UNDERSTANDING, wherein the Postal Service "specifically prohibited [the Inspection Service] from providing management with any recommendations or opinions as to the disciplinary action management should take" in a given case. This proscription, as a principle, is sound and had ought not be constructively circumvented by supervisors proceeding to discipline solely on the basis of the contents of an IM. IM's can be written, and often times are, in a manner that makes allegations appear as fact. The process of selecting what material to include and what material to exclude is subjective on the part of the writer. It would not be too difficult to structure an IM so that it actually made recommendations and/or expressed opinions as to discipline without actually stating them. It is a recognized fact that many supervisors accept the contents of an IM as factual and conclusive simply because it has been prepared by the Inspection Service. Thus, the IM need not specifically propose discipline to have the supervisor believe that discipline is necessary.

This is one of the cardinal reasons why it is necessary for the supervisor to make his own objective inquiry. The Handbook EL-921, Supervisor's Guide to Handling Grievances, stresses that personnel matters must be approached objectively. Also, the handbook notes that a thorough investigation is required and in fact mentions "just cause." Accordingly, in this matter because the supervisors issuing the proposed removal and the removal, in fact, did not conduct even an elementary investigation on their own, but instead, made their determination to discipline and approve discipline solely on the basis of an IM, and, further, did not even view the videotape which was made of the alleged transaction to determine if critical aspects of the investigation were correct as recorded in the IM, all ensuing discipline is flawed."

## CHAPTER 4

# THE ISSUE: HIGHER LEVEL REVIEW AND CONCURRENCE

# THE DEFINITION

All suspensions and removals proposed and issued by a manager must first be reviewed and concurred in by the installation head or that person's designee.

# THE ARGUMENT

The installation head or designee of the installation head must review and concur in a proposed suspension or removal prior to the issuing manager's issuance of the action. This "review" must not be just a perfunctory glance and nod, but rather an actual review and investigation to ensure the conclusions the issuing manager is proposing are accurate. The reviewing official must also ensure the issuing manager has conducted an investigation which meets the requirements of the Just Cause process including a pre-disciplinary interview. If the reviewing official does nothing more than glance and nod with no questions, no checking, no effort to ensure accuracy and due process, then Article 16.8's requirements for higher level review and concurrence are violated--and the employee's due process rights are violated--regardless of the extent to which the initiating manager did meet due process and Just Cause requirements. The employee is not entitled to due process from the initiating manager or the reviewing authority--the employee is entitled to due process from both and any less due process violates the Just Cause benchmark.

Coupled with the above stated due process issue is the circumstance in which discipline is ordered or "recommended" from a higher level official down to a lower level manager for issuance. When this occurs-- and independent authority to initiate or not initiate discipline is diminished or eliminated entirely--then true higher level review and concurrence as required by Article 16.8 cannot occur. The following is illustrative of this:

> Level 20 Manager Smith "recommends" to Level 16 Manager Jones that employee Doe be issued a removal. Level 16 Manager Jones issues the removal after obtaining review and concurrence from Level 22 Postmaster Bing. Although the Level 22 Postmaster did review and concur, he did not review and concur in any action proposed by Level 16 Manager Jones. His review and concurrence was for an action initiated by another manager. Article 16.8 requires that in no case may a supervisor impose suspension or discharge unless the proposed disciplinary action has first been reviewed and concurred by the installation head or designee.

In the scenario described, the "supervisor" referred to did not initiate and impose the removal because a higher level manager "recommended" and thus initiated it. There was no actual "proposal" from Level 16 Manager Jones thus there can be no true review and concurrence for Level 16 Manager Jones' "action".

In other cases, the higher level manager, say a Level 21 postmaster or Level 20 labor relations specialist, will "recommend" removal to a Level 17 floor supervisor. Then the Level 17 floor supervisor seeks and obtains "review" and "concurrence" from the same individual who recommended or "advised" removal in the first place. Whenever a manager reviews and concurs in the action he or she initiated, the check and balance requirement of Article 16.8's review and concurrence is fatally damaged--along with an employee's due process rights.

# THE COLLECTIVE BARGAINING AGREEMENT

Article 16.8 specifically requires higher level review and concurrence. The EL-921, "Supervisor's Guide to Handling Grievances", also refers to higher level review and concurrence. Together, these provisions are the basis for our arguments toward this check and balance due process safeguard. The provisions are as follows:

**ARTICLE 16 DISCIPLINE PROCEDURE**

**Section 8. Review of Discipline**

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

In associate post offices of twenty (20) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken.”

**Article 19's EL-921 - “Supervisor's Guide to Handling Grievances"**

“Therefore, it is crucial that the supervisor not only take good notes during the Step 1 discussion, but also advise both the reviewing authority and the designee for Step 2 that a grievance has been filed. Since the reviewing authority thoroughly reviewed the proposed discipline before it was initiated, that person will be a key source of information for management's Step 2 designee. There must be a clear channel of communication between these two individuals.

**D. Role of the Step 2 Designee**

The reviewing authority looks at the proposed discipline before it is imposed and concurs with the proposed action, based on the facts supplied by the supervisor. ...

Except to check out new facts which may be presented at the Step 2 discussion, the Step 2 designee will not have to develop management's case if the reviewing authority and supervisor involved have done their homework."

**JOINT CONTRACT INTERPRETATION MANUAL- ARTICLE 16.1**

**JUST CAUSE PRINCIPLE**

These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

**ARTICLE 16.8**

**CONCURRENCE**

It is normally the responsibility of the immediate supervisor to initiate disciplinary action. Before a suspension or removal may be imposed, the discipline must be reviewed and concurred in by a manager who is higher level than the initiating or issuing supervisor. This act of review and concurrence must take place prior to the discipline being issued.

While there is no contractual requirement that there be a written record of concurrence, as a practical matter, it is best to establish a record of the concurrence (by the concurring official signing/dating the discipline or disciplinary proposal).

**NATIONAL ARBITRATION CASE NO. E95R-4E-D 01027978 Arbitrator Eischen**

Contrary to the position advanced by the Postal Service in this case, however, that process of review and concurrence contemplated by Article 16.6 is not a ministerial formality or a mere technical "laying on of hands" by the reviewing/concurring official. The requirement of a separate and independent second step of review and concurrence by the higher authority is not met by just a declaration of agreement with the first step supervisor's proposed disciplinary action. Compliance with Article 16.6 requires a substantive review of the mater by the higher authority in light of all the current information and the higher authority's concurrence with imposition of the disciplinary action proposed by the supervisor.

**ISSUE NO. 1**

Article 16.6 Review of Discipline of the Extension to the 1995-1999 USPS-NRLCA National Agreement:

> b) Is violated if there is a "command decision" from higher authority to impose a suspension or discharge;
>
> c) Is violated if there is a joint decision by the initiating and reviewing officials to impose a suspension or discharge;
>
> e) Is violated if there is a failure of either the initiating or reviewing official to make an independent substantive review of the evidence prior to the imposition of a suspension or discharge;

**ISSUE NO. 2**

> (a) Proven violations of Article 16.6 as set forth in Issues 1 (b), 1(c) or 1(e) are fatal. Such substantive violation invalidate the disciplinary action and require a remedy of reinstatement with "make-whole" damages.

# THE INTERVIEW

Again, the interview is our key method of establishing the review and concurrence process was violated. When conducting our investigation, we can develop questions to pit the initiating" manager's story against the alleged reviewing and concurring officials version of his/her role, participation and investigation. It is also important to note that most managers, including management arbitration advocates, will resist the concept that the reviewing and concurring authority must conduct more than a glance and nod at the proposed action.

Nevertheless, a reasonable reading of Article 16.8 clearly tells us that review is required. Review is defined in **Webster's Dictionary** as follows:

> **"1. To inspect; to make formal or official examination of the state of; 2. To notice critically."**

Now, the interview examples:

***For the "Initiating" Manager***

- Did Postmaster Sims ask you if you had conducted a Pre-disciplinary Interview prior to initiating Removal?

- Did Postmaster Sims ask you if you forewarned the grievant that you were contemplating a charge of Misappropriation of Postal Funds?

- Did Postmaster Sims ask you if you forewarned the grievant that you were contemplating Removal?

- Did Postmaster Sims ask you if you had presented any evidence to the grievant for response?

- What evidence did you tell him?

- Did Postmaster Sims ask you who you interviewed prior to initiating the removal?

- Did Postmaster Sims ask you what your investigation consisted of prior to your initiating the removal?

- Prior to issuing the Notice of Removal did you speak to anyone in management about removing employee Thomas?

- Prior to issuing the Notice of Removal did you properly follow Postmaster Sims' instruction to initiate the removal?

- Were you required under the Collective Bargaining Agreement to follow the Postmaster's instructions and remove employee Thomas for theft? Drug use? (Best for this question to be utilized in serious offense situations in which the steward believes the lower level manager had little or nothing to do with the decision to issue.)

- Did you meet with anyone in management prior to issuing the Notice of Removal? (If the two managers did not meet then a true review and concurrence would have been more difficult.)

- What documents did Postmaster Sims review upon your presentation of the proposal for discipline?

- What documents did you present to Postmaster Sims for his review prior to your receiving concurrence?

- Who instructed you to seek concurrence from Manager Smith?

- Was that instruction in writing?

- Who designated Manager Smith as the Higher Level authority for you in this discipline?

- Was that designation in writing?

- Does Manager Smith always review and concur on discipline on tour 3 in the Anytown Post Office?

- Did you seek Higher Level concurrence prior to initiating your request for discipline?

- Did you seek Higher Level concurrence after you received the removal notice from labor relations? Personnel?

- How long did your meeting with Postmaster Sims take at which time the discipline was reviewed and concurred?

- Where did the review and concurrence meeting take place?

- Were you present when Postmaster Sims reviewed and concurred?

- Did you leave Postmaster Sims the removal for review and concurrence in his mail receptacle?

- You don't know what his review consisted of do you?

- You don't know what information he reviewed do you?

- You don't know whether Postmaster Sims reviewed any information other than the disciplinary notice do you?

- As far as you know, Postmaster Sims only reviewed the disciplinary notice and nothing else?

- Did Postmaster Sims speak to employee Doe, who is being removed prior to concurring?

- What Level are you?

- What Level is the concurring official?

***For Concurring Official:***

- Who presented this removal to you for concurrence?

- Was it presented in person?

- What documents were presented with the removal notice?

- Was the proposal presented before the actual notice of removal was formulated?

- What documents did you review prior to concurring?

- Who did you speak with regarding the removal prior to concurring?

- Did you speak with employee Doe, who is being removed, prior to concurring?

- Didn't you think it important to speak with employee Doe prior to concurring?

- Did supervisor Jones speak with employee Doe prior to your concurrence?
- Who did supervisor Jones speak with prior to initiating this discipline?
- Was a pre-disciplinary interview conducted by supervisor Jones before this action was initiated?
- Do you know whether or not supervisor Jones interviewed anyone prior to initiating this discipline action?
- Did you interview anyone prior to concurring with this disciplinary action?
- Did supervisor Jones provide you with any information when he sought review and concurrence from you?
- What information did supervisor Jones provide you with when he sought review and concurrence?
- Did you meet with supervisor Jones prior to concurring?
- Did you question supervisor Jones prior to concurring?
- Did you ask supervisor Jones whether or not he had conducted a pre-disciplinary interview with employee Doe prior to initiating the removal?
- Did Supervisor Jones forewarn the grievant that a charge of Misappropriation of Postal Funds was being contemplated?
- Did you ask Supervisor Jones whether he had forewarned the grievant that a charge of Misappropriation of Postal Funds was being contemplated?
- Did Supervisor Jones forewarn the grievant that Removal was being contemplated?
- Did you ask Supervisor Jones whether he had forewarned the grievant that Removal was being contemplated?
- Did Supervisor Jones present any evidence to the grievant for his response at the Pre-disciplinary Interview?
- Did you ask Supervisor Jones whether he had presented any evidence to the grievant for his response at the Pre-disciplinary Interview?
- What evidence?
- Did you ask supervisor Jones what documents were reviewed prior to his initiation of the removal?

- Did you ask supervisor Jones who he had interviewed or spoken to regarding employee Doe prior to initiating the removal?

- What information did supervisor Jones review before he initiated the discharge?

- Did you ask supervisor Jones what information he reviewed before he initiated discharge?

The questions asked of both the alleged initiating supervisor and alleged higher level authority will be very revealing and crucial to the establishment that proper review and concurrence does not exist. Many of the questions can be asked of both individuals and by changing elements within the questions serious breaches in credibility can be uncovered. Cross checking questions when dealing with these two major protagonists of the disciplinary process will almost certainly reveal differing answers which prove due process violations. Many of the questions will also be useful in arguing the lack of investigation issue.

Without the interviews--and this cannot be overemphasized--management will be able to patch up the violations and, at arbitration, the true nature of the discipline's initiation, actual authority in issuance, and whether or not true review and concurrence occurred will be lost to the Union as due process arguments and violations.

# THE ARBITRATORS

Higher Level Review and Concurrence, which has historically been a major due process requirement, is second only to the pre-disciplinary interview as a compelling due process Just Cause issue. The arbitral history is as follows:

| | | |
|---|---|---|
| ***Arbitrator Jonathan Dworkin*** | | ***Case No. C4C-4C-D 20367*** |
| ***Denver, CO*** | ***February 2, 1987*** | ***Pages 23-25*** |

"The Acting Manager of Mail Processing was totally unaware that his letter to Grievant initiated a removal. He testified at length at the hearing on the subject. Before signing the disciplinary proposal, he discussed the matter thoroughly with the Englewood Postmaster. In truth, it is not entirely accurate to say he "discussed" the matter. He was told by the Postmaster that Grievant had not followed procedures and action needed to be taken. He was handed the detailed, two-page Notice of Proposed Removal and directed to sign and issue it. The Acting Manager did as he was instructed. But he had not the faintest idea of what it was he signed. He testified repeatedly that he had no belief Grievant was guilty of any kind of criminal conduct and all he meant to do was charge Grievant with impropriety in handling public funds. His discharge proposal contained several citations from the Employee & Labor Relations Manual; the Acting Manager did not know the contents of any of the cited provisions. His knowledge was strictly limited to the fact that Grievant failed to follow certain procedures. He knew he was issuing discipline, but thought he was placing Grievant on administrative leave or, at most, an indefinite suspension. He did not know he was triggering Grievant's removal; he did not intend the Employee's removal.

After the proposal was issued, the Englewood Postmaster wrote a concurring Letter of decision. It is unnecessary to burden this record with much analysis. The facts speak eloquently for themselves. It is abundantly clear that the Acting Manager's participation in this discipline was only that of an agent who made no independent judgment whatsoever. In effect, the Postmaster proposed and concurred in Grievant's removal. This process fell markedly short of the unequivocal requirement of Article 16, Section 8 and robbed the discharge of just cause.

The Arbitrator does not mean to imply that a supervisor who proposes discipline must do so wholly independently, and is prohibited from discussing the matter with a higher-level manager who ultimately might be the concurring authority. Article 16, Section 8 does not prohibit discussion, review, or recommendations. But it does require some decision-making on the part of the lower-level supervisor. In this case, there was no decision-making relative to removal and, therefore, no concurrence. No matter how much Grievant deserved his discharge, the penalty was extra-contractual and cannot stand."

***Arbitrator Nicholas H. Zumas*** ***Case No. E1R-2F-D 8832***
***Fleetwood, PA*** ***February 10, 1984*** ***Pages 5-6***

"Implicit in the language of Article 16(6) is the requirement that a supervisor (or a postmaster in a small installation) make a recommendation or decision as to the imposition of discipline before referring the matter for concurrence to higher authority. All such decisions, of course, are subject to review either within or outside the installation depending on the size of the facility. It follows that the decision to impose discipline or the nature of the discipline may not be initiated, as in this particular case, outside the installation by higher authority. As outlined above, Eberly made no recommendation and no decision with respect to disciplining Grievant; he merely concurred in the termination decision after it came down from the Lancaster MSC. Failure to carry out his responsibility under the National Agreement rendered Eberly's issuance of the Notice of Removal a nullity."

***Arbitrator Wayne E. Howard*** ***Case No. E7C-2B-D 9220***
***New Hope, PA*** ***May 23, 1989*** ***Page 6***

"Article 16, Section 8 of the Agreement, however, requires an independent initiation and independent review by higher authority of all discipline assessed by the Service, as this arbitrator has stated on a number of occasions. Independent initiation did not occur on the part of Postmaster Shamp who signed the Notice of Removal. According to the testimony of Director of Human Resources Jeffrey Moran, Postmaster Shamp contacted him for "advice and counsel." He told the Postmaster that "the information in the Investigative memorandum pointed toward removal." While there is no doubt in the mind of the arbitrator that Director Moran was attempting to render bona fide counsel, the specificity of his recommendation, in the mind of the arbitrator, denied the grievant the independence of initiation the grievant was entitled to under Article 16, Section 8 of the Agreement. On this narrow ground the removal of the grievant must be overturned."

***Arbitrator George V. Eyraud, Jr.*** ***Case No. S0C-3A-D 9758***
***Arlington, TX*** ***November 6, 1992*** ***Pages 11, 12***

"Superintendent Sellers signed and issued the Notice of Removal here. He also denied the grievance at Step 1 and at Step 2. With the exception of Mr. Black's input at the alleged pre-disciplinary interview, no other manager seems to have had any voice in determining Grievant's fate. Sellers had acted similarly in writing and cashing checks at the window. In spite of this fact, he chose to pass judgement on the Grievant. Further, there was no evidence of review of the discipline as required under Article 16, Section 8. Such failure, as here, can be fatal to a discharge."

## CHAPTER 5

# ISSUE: AUTHORITY TO RESOLVE THE GRIEVANCE AT THE LOWEST POSSIBLE STEP

# DEFINITION

A lower level manager discusses a disciplinary grievance at Step 1 or 2 after a higher level manager either issued the discipline or actually made the decision to issue.

# THE ARGUMENT

An offspring of the Higher Level Review and Concurrence due process issue is whether the manager discussing the resultant grievance for the discipline has actual authority to resolve the grievance. Often a lower level manager--possibly the issuing supervisor--meets at Step 1 of the Grievance/Arbitration process. That manager may have been instructed by the Tour MDO, Plant Manager, or Postmaster to issue the discipline. If so, then no reasonable expectation can exist that that lower level manager has or will have true independent authority to resolve the grievance. It is not a reasonable expectation to believe a subordinate can or will overturn the decision of a boss.

Through interviews and investigation, it may be determined that the alleged higher level concurring official was the impetus behind the issuance of the discipline. While management may claim the lower level supervisor initiated and issued, the steward has ascertained that in reality the decision to initiate and issue was that of the higher level manager--not of the lower level supervisor. Now the grievance is presented at Step 1 with the lower level supervisor. That manager cannot reasonably, or in any way in reality, be expected to possess the actual authority to resolve the case at Step 1. Such authority requires a measure of independence and that independence simply does not exist in the USPS management structure when the true decision comes from the top to a lower level.

Once a lower level manager, without the authority required by the Collective Bargaining Agreement, discusses a grievance and inevitably issues a denial, the due process rights of the grievant and of the grievance--and of the Union--for full, fair, lowest possible step resolution are lost forever. This breach cannot be repaired. If independent authority does not exist, then it cannot be created.

# THE COLLECTIVE BARGAINING AGREEMENT

Language in Article 15, Sections 2, and 4 are utilized in support of the Union's position whenever a manager does not possess the true authority to resolve a grievance at the lowest step:

**ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE**

**"Section 2**. Grievance Procedure Steps

**Step 1**
**(b)** In any such discussion the supervisor shall have authority to settle the grievance.

**Step 2**
**(c)** The installation head or designee in Step 2 also shall have authority to grant or settle the grievance in whole or in part.

**Section 4.** Grievance Procedure - General

**A.** The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end."

**ARTICLE 19's EL-921, - "Supervisor's Guide to Handling Grievances"**

"It is the responsibility of local management to resolve as many grievances as possible at Step 1. When a grievance has merit, you should admit it and correct the situation. You are a manager--you must make decisions--don't pass the buck. Your decision on a grievance should be based on the facts of the situation and the provisions of the National Agreement. You should listen to the employee's or union's grievance and make sure of the facts."

The basic principle of Article 15 is commitment of the parties to lowest possible step resolution as stated in Article 15.4A. That principle cannot be achieved whenever higher level managers take actions and the charade of lower level managers discussing grievances occurs.

# THE INTERVIEW

Many of the questions the steward uses in his investigation of the higher level review and concurrence issue will be revealing and pertinent to our argument that authority to resolve does not exist. There will even be instances in which lower level supervisors admit they have no authority because they "were ordered" or the decision "came from the top". The following examples will assist in eliciting beneficial responses:

- You did not initiate a request for discipline?
- You normally do initiate a request for discipline?
- The Notice of Removal was prepared by personnel/labor relations and presented to you for your signature?
- You knew nothing of this action prior to being presented with the prepared notice?
- You really don't know much about the circumstances leading to this action do you?
- What circumstances were you aware of prior to issuing the removal?
- What manager does know about the circumstances?
- This really came from up the chain of command?
- From who?
- You signed it because you are employee Doe's immediate supervisor?
- You will be meeting at Step 1 because you are employee Doe's immediate supervisor?
- What Level are you?
- What Level is the Postmaster? MDO? Plant Manager?

***Questions for Step 1 Meeting (Not before)***

- Can you resolve this?
- Could you resolve this if you wanted to?
- You can't really resolve this or attempt to resolve it because the Postmaster made the decision?
- This removal really came from the Postmaster to you, isn't that correct?

- Since this wasn't your decision, you can't really seriously consider resolving it can you?
- They don't expect you to resolve this since it wasn't your decision?
- (Why are you) You are stuck with discussing this when the Postmaster made the decision?

With regard to this last group of questions, be careful to not tip your hand too much until you are actually discussing the grievance at the grievance meeting. If you do, you may see management change who is going to meet with you. Even if the Postmaster did issue the notice and is going to meet with you, it does not mean the real decision was made by the Postmaster. Often, and especially in cases involving the OIG/Postal Inspection Service, the decision comes from the district and/or labor relations or even through pressure from the Postal Inspection Service/Office of Inspector General. The local Postmaster may still be willing to admit he had nothing to do with actually making the decision to issue the discipline and/or wanted no part in it.

In instances in which there is no evidence that a decision came from a higher level to a lower level, a due process breach may still be created. The steward--whenever possible--should attempt to discuss a grievance at Step 1 with a manager of a lower level than the issuing supervisor. Once such discussion occurs, we include in our Step 2 appeal the contention that lower level manager Jones cannot reasonably be expected to possess the authority to overturn or modify a boss' (higher level manager's) decision.

## THE ARBITRATORS

Arbitral reference on the lack of authority to resolve the grievance issue is often intermingled with higher level review and concurrence since that is where the issue most often manifests itself.

The best of these decisions are quoted below:

**Arbitrator J. Fred Holly** **Case No. S8N-3F-D 9885**
**Little Rock, AR** **May 20, 1980** **Pages 6-7**

"The grievance procedure set forth in Article XV of the National Agreement provides that first step grievance discussions must be with the Grievant's immediate Supervisor, and "the Supervisor shall have authority to settle the grievance." In the instant case, the appropriate representatives met at Step 1, but a serious question arises regarding the Supervisor's authority to settle the grievance. Can one realistically assume that the Supervisor had authority to settle the grievance in this situation where the removal action had been initiated by the Sectional Center Director of Employee and Labor Relations? Obviously not, and the Step 1 procedure was no more than a charade.

The contractual provisions regarding Step 2 provide that on an appealed grievance "the installation head or designee will meet with the steward..." The clear intent of this provision is to assure that an authority higher than the Employer representative who initiated the action which gave rise to the grievance will be the Employer's hearing representative. This condition was not met since the Employer representative at Step 2 was the same official who initiated the removal action; that is, the Sectional Center Director of Employee and Labor Relations. Hence, Step 2, like Step 1, was ineffective and meaningless and as a consequence the Grievant was deprived of procedural due process."

***Arbitrator Dennis R. Nolan*** ***Case No. S4N-3A-D 37169***
***Dallas, TX*** ***March 6, 1987*** ***Pages 5-6***

"Article 16.8 requires that a supervisor must discipline and that higher authority must concur. Article 15.2 requires that Management's Step 1 representative have authority to settle the grievance. The rule of Article 16.8 is a debatable one. Most of the private sector, for example, gets along quite well without it. Were this a case of first impression, and were that section to be read alone, I would be inclined to interpret that provision loosely as allowing discipline so long as the immediate supervisor participated in the decision. Article 16.8 cannot be read alone, however, and this is not a case of first impression. Article 15.2 clarifies the intention of 16.8 by assuring that the immediate supervisor can resolve disciplinary grievances at Step 1; this would make sense only if the same supervisor initiated the discipline, for if higher authority initiated it the first-level supervisor would hardly be in a position to reverse that decision.

Moreover, several prior arbitration awards interpret these provisions strictly and overturn disciplinary decisions imposed from above. See in particular the award of Arbitrator Zumas in Case No. E1N-3B-D 15278 (Philadelphia, PA, February 8, 1985) and the other awards cited there at pages 7 and 8. Those awards interpret these contractual provisions as creating fundamental due process rights, not least because disciplinary decisions made at higher levels turn the first step of the grievance process into a sham."

"A reasonable interpretation of the circumstances of the processing of this instant grievance at the Greer Post Office could find that the grievance appeal provisions were violated both implicitly and explicitly by Postmaster Becker's decision to file the discipline himself.

It should be recalled that the accident was investigated by Supervisors Daniels and Slemmons, both of whom were the immediate Supervisors of the grievant with the latter acting in that capacity on the day of the accident. Despite their greater amount of direct knowledge, since both were the first to reach the scene of the accident and Slemmons accompanied the grievant to the hospital, while Daniels investigated and took photographs, Postmaster Becker, the 2nd Step designee, chose to initiate the discipline which he would have to review in his appeals capacity, unless he chose to remove himself from the proceedings.

A reasonable interpretation of the intent of Article 16.8 is that in an office of over 20 employees initial disciplinary action should normally be initiated by lower level supervisors with either the Postmaster or his designee concurring or not as he/she saw fit. Thus, normally Slemmons would have initiated a disciplinary action, and his Supervisor, in this case Postmaster Becker, would have been the concurring official. In the instant situation, the section of the Agreement requiring concurrence in disciplinary action by a higher officer than the one who initiated it was complied with by Postmaster Becker's submission of the Disciplinary Request to his Supervisor (Sec. C. Manager/ Postmaster R.B. Burnett of Greenville, So.C.) Who concurred in it. This compliance was the basis upon which 3rd Step Reviewing officer Coble's statement, that no procedural errors had taken place, was hypothecated. However, those sections requiring that the Step 1 and Step 2 officials "have authority to grant or settle the grievance in whole or in part," which were designed to assure the independence of the hearing officers and the integrity of each step of the grievance appeal process as a possible decision making one, were frustrated. Despite his statements to the contrary, it would be presumed, once Becker had decided to alter the normal sequence and request the Letter of Suspension, that Supervisor Slemmons would be loathe if not unwilling to pursue an independent course and reverse his superior. That, in effect, nullified the first step of the hearing.

The second step of the grievance appeal process was at least equally, if not even more strongly marred. It would be unreasonable to expect that the Postmaster, who chose not to remove himself from the proceedings, would alter, modify, or reduce a penalty which he felt so strongly about that he directly involved himself in the disciplinary process, at the earliest stage. The fact that he, according to his own testimony, was willing to trade off his own Letter of Demand for $2,000, which he as a Postmaster had the sole authority to issue, for the Union's acceptance of the suspension, ($400) indicates that the conclusion of the 2nd Step Appeal was a foregone one. Thus, both of these vital stages of the grievance appeal process were not only fundamentally flawed but also the

effect of these deficiencies was to deny the grievant that due process requisite to a fair hearing."

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| ***Arbitrator G. Allan Dash, Jr.*** | | ***Case No. E4C-2M-D 36491 & 37089*** |
| ***Clarksburg, WV*** | ***April 21, 1987*** | ***Pages 14-15*** |

1. The Letter of Removal issued to Grievant Small, and the Letter of Proposed Removal issued to Grievant Cole, were the work of Support Director Fisher. Supervisor Radtka had no choice but to sign the letters when his superior submitted them to him. His signature thereon did not make the documents his own; they still constituted the decision of Support Director Fisher.

2. As the author of the "Letters," Support Director Fisher did not have the Agreement right to "concur" therein. He was the designee of Postmaster Abernathy, the highest ranking Postal official at the Clarksburg, West Virginia MSC. To satisfy the requirements of Article 16, Section 8, the Letters, initialed and authored by the Postmaster's Designee, should have been concurred in by the next higher Postal authority above the MSC Postmaster, apparently the Manager of Labor Relations at the USPS Charleston Division office, Charleston, West Virginia. They were not concurred in by that division Postal authority.

3. After the Small and Cole grievances were filed the Union's representative had the right to engage in an Article 15, Section 2, Step 1 discussion with Supervisor Radtka in which both participants should have had the authority to settle or withdraw the grievances. Union Steward Somazze had that authority for the Union; Supervisor Radtka did not have that authority for the Postal Service."

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| ***Arbitrator Nicholas H. Zumas*** | | ***Case No. E1r 2f D 8832*** |
| ***Fleetwood, PA*** | ***February 10, 1984*** | ***Page 6*** |

"Two. The Step Procedures outlined in Article 15 of the National Agreement are intended to provide an opportunity for the parties to resolve a dispute before proceeding to arbitration. A supervisor at the Step 1 and Step 2 levels has the authority to resolve and settle the dispute after meeting with a Grievant and his Union representative. In the instant case, Postmaster Eberly was the Service representative at Step 1 (in lieu of Supervisor Strohm who was absent.) Eberly's decisional authority to resolve the dispute at this stage was non-existent; it had been improperly usurped by E. Lynn Ervin, the E&LR Director at Lancaster. As such, the grievance procedure, during the various Steps, had become a sham."

## CHAPTER 6

# ISSUE: DENIAL OF INFORMATION

# THE DEFINITION

Management denies information to the Union necessary for determination as to whether or not a violation exists or for grievance investigation/processing.

# THE ARGUMENT

Whenever management denies information in the form of documentary evidence or witness access for interviews, our due process rights to conduct investigations in grievance processing are violated. In the course of an investigation to determine whether to file a grievance or for evidence gathering in support of a grievance, the Union has the right to access all relevant information. Often, management denies the Union access to documents, records, forms, witnesses, etc. This denial by management constitutes a very serious due process breach which prevents the best possible defense in a disciplinary case through full development of all defense arguments.

Under the Collective Bargaining Agreement, the Union has contractual rights to all relevant evidence including witnesses and management creates one of our most successful Due Process defenses when it denies us access to information. Should management deny information, then several arguments are born:

**1. Negative Inference Created**

The negative inference argument is best defined as a presumption that the evidence withheld by management would either prove the Union's case or seriously damage the employer's ability to meet its Just Cause burden of proof.

> **Example**: Management denies the Union access to the attendance records of the issuing supervisor and several craft employees in the course of the Union's investigation into an attendance-related removal.

The negative inference drawn is that examination of those attendance records for the supervisor and the craft employees would reveal disparate or unfair treatment to the grievant. The act of withholding by management casts shadow and doubt on the reasons for the withholding--that management does not want to let the facts be known as those facts will damage management's case. The Union must also argue that the withheld information would have proven - if it had been produced - precisely what the Union contended the information would have revealed.

**2. Lowest Possible Step Resolution Fatally Damaged**

Resolution of grievances at the lowest possible step is the cornerstone of Article 15's Grievance/Arbitration procedure. When management denies the Union access to relevant information, then full development of all the facts, arguments, Collective Bargaining Agreement reliance, and defenses cannot be achieved. Without such full development and without everything being placed before the parties for discussion at the lowest possible step, there can, in actuality, be no real possibility of lowest possible step resolution of a grievance.

Thus, Article 15.4A's basic principle is violated and with it the due process rights of the grievant, the grievance and the Union to benefit from the possibility of lowest possible step resolution.

**3. Defenses Denied Development**

Articles 15, 17, and 31 all provide the Union the ability to fully develop all the facts through evidence gathering to ensure every available argument and defense is set forth on behalf of the grievant. When management denies the Union access to relevant information, it prevents the Union from formulating and ultimately providing the best possible defense. Such denial violates the basic due process right of the Union to defend an employee against discipline and an employee's basic due process right to the best possible defense.

Management will often attempt to provide the Union information after a particular step in the Grievance/Arbitration procedure. Our position, whether we accept access to the tardy data or not, must be that the due process violation cannot be corrected as the lowest step for possible resolution is forever gone through the passage of time and the Collective Bargaining Agreement's time limits. Nor should we accept remands to a prior step for further discussion in conjunction with receipt of the information to which we were originally denied access. Such a remand will negate our due process argument for denial of information.

Depending upon the case, a remand may be considered if it is coupled with an agreement to make the employee whole for the period through the remand date if loss to the employee has occurred. Such an agreement would have to be weighed versus the value of the due process argument and the harm the loss has had to the grievant.

In arbitration, we must argue that denial of evidence at any stage of the Grievance/ Arbitration procedure precludes the presentation of that evidence at the arbitration hearing. Due to management violations of Articles 15, 17, and 31, and management's denial of due process to the Union, grievance, and grievant, it would be wholly inappropriate and unfair for an arbitrator to even be exposed to denied information.

**WHEN INFORMATION IS DENIED**

When a request for access to information is denied, we must ensure that the "hook is set" through very deliberate action. That action includes the following:

**1. File an additional grievance-citing Articles 15, 17, and 31 – regarding the information denial.**

*In that grievance, request as a remedy:*
(1) The information be provided so long as such access is given prior to any grievance step meetings and,
(2) Should the information not be provided – no later than at the Step 2 meeting - that the original grievance's corrective remedy be sustained in its entirety.

Although it can be argued an additional grievance is neither necessary nor reasonable under our Collective Bargaining Agreement, many arbitrators will ask the question and let management off the hook if the Union did not file the repetitive grievance.

**2. Correspond With Follow up Requests For Information**

Follow the initial Request for Information with a personalized letter taking the Request for Information form to a more specialized level. In this manner, an arbitrator will notice the Union made a persistent, "second effort" to obtain the information. It is a good idea to submit at least two (2) correspondence in addition to the original Request for Information prior to the Step 2 meeting. At least one of the two should be to the immediate superior of the addressee to the original Request for Information. It is also recommended that a RFI be sent to the supervisor's boss – with the other requests attached – if the superior does not ensure compliance. Involving more managers is beneficial – RFI "maximization." In this way, we can point out to the Arbitrator we were making every effort including affording a higher level manager the opportunity to rectify the lower level supervisor's failure.

**3. Include the Denial of Information Reference in the Disciplinary Grievance's Step 2 Appeal**

Following the full disclosure commitment of the parties in Article 15, and our responsibility to present fully developed grievances at Step 2 (as far as possible), we must ensure that each bit of information we are denied access to during our attempted investigation is referenced as part of our contentions in our Step 2 appeal. We must cite the violations of Articles 15, 17, and 31 and argue the three major due process arguments: Negative inference, fatal damage to lowest possible step resolution and development of defenses denied.

Specifically citing the Articles' 15, 17, and 31 argument in our Step 2 appeal will prevent management from successfully arguing that the denial of information issue is a new argument and not proper for consideration by the Arbitrator. Remember, request all data you believe to be relevant. We then determine what we will use.

Management, when it denies any evidence, violates the Collective Bargaining Agreement and creates very strong due process breaches. Many times, the arguments management creates by denying us information are far more beneficial to our defense than would be the information had it been obtained.

# THE COLLECTIVE BARGAINING AGREEMENT

Articles 15, 17, and 31 are the Collective Bargaining Agreement authority which clearly requires management to provide the relevant and necessary information for grievance processing and violation determination:

**ARTICLE 15 - GRIEVANCE ARBITRATION PROCEDURE**

**"Section 2** Grievance Procedure Steps

**Step 2:**
**(d)** At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31. The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above."

**ARTICLE 17 - REPRESENTATION**

"**Section 3**. Rights of Stewards

The steward, chief steward or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied."

**ARTICLE 31 - UNION-MANAGEMENT COOPERATION**

"**Section 3**. Information

The Employer will make available for inspection by the Union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information."

**JOINT CONTRACT INTERPRETATION MANUAL – RIGHT TO INFORMATION**

The union's entitlement to information relevant to collective bargaining and contract administration is set forth in Article 31.3. Article 17.3 states specific rights to review documents, files and other records, in addition to the right to interview a grievant, supervisors and witnesses. A request for information should state how the request is relevant to the handling of a grievance or potential grievance.

Management should respond to information requests in a cooperative and timely manner. When a relevant request is made for documentation, management should provide for the review of the requested documentation as soon as is reasonably possible.

Information relied on by the parties to support their positions in a grievance should be exchanged between the parties' representatives at the lowest possible level.

# THE INTERVIEW

While most arguments on information denials will seem self-evident based upon review of management comments on the requests for information, coupled with a "denial" signature or initials, the interview is crucial when there is no such notation. Further, the interview can strengthen our case when management supports its denials through responses. Some examples are:

- You did deny the information?
- You have the information requested on the Request for Information in your possession?
- You relied on that information in issuing the removal?
- You interviewed Postal Inspector Arnold prior to issuing the Notice of Removal?
- You did not provide access to Postal Inspector Arnold to the Union?
- Doesn't Article 17.3 give the Union access to witnesses?
- Are you saying Postal Inspector Arnold is not relevant to the Union's grievance?
- What Collective Bargaining Agreement article did you rely upon in denying the Union access to Postal Inspector Arnold?

Denial of information is often a Catch-22 for management and our interview process enables management to really damage its defense of the denial. The interview also ensures management is prevented from presenting some innovative excuse for the denial at arbitration. We not only want proof of denial for our Step 2 appeal, but we want to cement management's reasons for denial. This will greatly enhance our pursuit of this due process violation.

# THE ARBITRATORS

Arbitrators have provided excellent language on the issues related to denial of information and, in some cases, overturned disciplinary actions in their entirety solely on that basis:

***Arbitrator Carl F. Stoltenberg*** ***Case No. E4T-2A-D 38983/38986***
***Philadelphia, PA*** ***October 4, 1988*** ***Pages 13-16***

"The Agreement provides, at Article 31, Section 3, that the Postal Service will make available for inspection all relevant information necessary for determining whether to file or to continue to process a grievance. The same provision also indicates that the Postal Service will provide all relevant information necessary for the enforcement of the Agreement. The same basic rights are afforded Union Stewards in Article 17, Section 3 of the Agreement. During the course of the arbitration hearing the Union raised a continuing objection to certain exhibits offered by the Postal Service. In fact, the Union had not seen much of this information prior to the hearing. In light of the Union's repeated requests for this exact information, the Postal Service's failure to make this information available provides grounds for sustaining this grievance solely on procedural grounds.

***The Union simply was not given access to information during the processing of the grievance to allow it to prepare and evaluate its case. The Postal Service had access to the requested information and has not presented a convincing reason for withholding the information from the Union. Since the information had been requested by the Union well prior to the instant hearing, the Postal Service's failure or refusal to comply with the request acts as a bar to continuing the hearing. The information was withheld despite repeated requests. Forcing the Union to now go back and prepare its defense so long after the disciplinary action was taken and the request for information was made, would be improper. For all these reasons, the Grievant is to be returned to employment will full back pay to the time of his placement on emergency off-duty status through his period of removal. The procedural defects established on the record prevent a ruling on the merits of this case since the Grievant has been denied due process."

***Arbitrator Josef P. Sirefman*** ***Case No. N7C-1N-D 0027177***
***Paterson, NJ*** ***March 18, 1994*** ***Pages 11-13***

"There is also a fundamental due process concern which transcends comparative disparate treatment analysis and casts a very long shadow over this particular proceeding. It is the time it took for the Service to produce the supervisor's files, thereby postponing the processing of this grievance for about three years. Management clearly has the right to pursue all remedies, procedures and appeals (as does the Union) such as contesting a request for information which it considers inappropriate; and there is no intention to place a chilling effect on the exercise of that right. But the determination to contest the Union's request through the NLRB and the Federal Courts must have consequences when the relevance of the requested information was apparent on its face; had

been established by a prior arbitration award E4T-2A-D 38983, Arbitrator C. F. Stollenberg (sic) (1988), and adhered to in E7C-2F-D 39941 (1992 same Arbitrator); and seemed so evident to the NLRB and no doubt to the Federal Appeals Court. This is especially true when the dispute over relevance could have been raised in grievance or arbitration forums.

In such a circumstance the right of the Service must be weighed against the disadvantages it causes to a Grievant who has been removed and now must wait years in order to have a full hearing, including consideration of the disputed material. That the particular disparate treatment may or may not prove to be dispositive for an Arbitrator is not the point. The detriment to the Grievant because of the inordinately long delay before the material would become available for consideration as part of his defense against removal is. In my opinion, the delay in this particular case has been so long as to outweigh the Service's arguments on the merits. It outweighs any consideration of whether or not Grievant has been an ideal employee. It constitutes basic deprivation of due process and warrants retraction of the Removal Notice and reinstatement with back pay.

***The videotape is undoubtedly relevant information, as is the evidence obtainable by interviewing the Inspectors. Despite the clear mandate of Articles 15 and 31, the Service did not make the tape or the Inspectors available to the Union until November 3--after the Step 2 meeting and after the Grievant's status had been changed by the issuance of the Notice of Removal on November 1.

The National Agreement and the cases submitted by the Union are clear. The Service is required to provide relevant, properly requested information to the Union to allow it to process grievances. Article 31 requires this at any stage of the various processes delineated. Article 15 makes clear that the Step 2 hearing is the latest that the Service can provide this information. The Step 2 hearing here was held on October 29 and the information was not provided until November 2. This was not timely and the grievances must, therefore, be granted."

***Arbitrator Randall M. Kelly*** ***Case No. A90C-1A-D 94005201 & 94011159***
***Trenton, NJ*** ***May 10, 1995*** ***Pages 6-11***

"The only issue before me at this time is the effect on this arbitration of the refusal of the Service to disclose the identity of the Confidential Informant and, as part of that, its refusal to allow the Union to interview the Confidential Informant or to review the recordings of transactions involving the Confidential Informant. The Union asserts that this clear procedural, due process violation mandates the dismissal of the disciplinary actions against the Grievant and, in the alternative, that if the case is not dismissed, that the Confidential Informant be barred from testifying and the recordings of transaction excluded. The Service argues that it is not required to reveal the identity of the Confidential Informant in order to protect the Confidential Informant and ongoing investigations.

I am denying the Union motion to dismiss the disciplinary actions against the Grievant and granting its motion to exclude testimony from the Confidential Informant and recordings of transactions between the Confidential Informant and the Grievant.

Here, the Service provided the Union the Investigative Memorandum and the ability to interview the Postal Inspectors involved. The supervisors who assessed the discipline did not have access to the identity of the Confidential Informant, nor did they review any recordings of transactions. The decision to take disciplinary action was based almost solely on the content of the IM and a newspaper account of the arrest of the Grievant. Without prejudging the significance of this fact, I feel that the Service should be allowed to present its case on the basis of the information available to the supervisors at the time the decision to impose discipline was imposed--information admittedly shared with the Union. This ruling preserves the spirit and intent of the relevant contractual provisions and balances the rights of the Service, the Grievant and the Union."



"The burden of proof is on the Union to establish that casuals were used in lieu of PTFs. In order to meet its burden of proof, the Union must rely on facts that are only in the possession of Management. Both the National Agreement and the law provide employers with an obligation to provide information that is requested and relevant to the processing of grievances. Without this information, a union is unable to fulfill its duty of fair representation. The obligation to supply relevant information levels the playing field between the Parties. In the instant case, the Union requested information and it was not provided. Then, the information was no longer available. In spite of these facts, the Advocate for the Service charged that the Union failed to meets (sic) its burden of proof because it did not name the casuals involved in this matter. This is akin to what is referred to as a "self fulfilling prophecy". It is well established in arbitral authority, as cited by the Union and as is found elsewhere, that when relevant information is requested and denied, an adverse inference can be drawn; that inference being that the information would be adverse to the party in possession of it and therefore, that party is not releasing it. There is another principle in labor relations that once it is determined that the information was improperly withheld, the party seeking the information can proffer what it believes the information to be and the party refusing to give the information is barred from rebutting the proffered contentions of the requesting party.

## CHAPTER 7

# THE ISSUE: NEXUS (CONNECTION) BETWEEN OFF-DUTY MISCONDUCT AND USPS EMPLOYMENT

# THE DEFINITION

There must exist a nexus or connection between off duty misconduct and Postal employment for Just Cause to exist when an employee is disciplined due to off duty misconduct. Many arbitrators apply the following guidelines for demonstration of the nexus:

***Arbitrator Robert W. McAllister*** ***Case No. C4C-4B-D 37415 & 37416***
***Detroit, MI*** ***February 22, 1988*** ***Pages 11-12***

"2. The record must establish that the misconduct is somehow materially job-related, i.e., that a substantive nexus exists between the employee's crime and the efficiency and interests of the Service. Such a nexus may be demonstrated through:

a: Evidence that the crime has materially impaired the employee's ability to work with his fellow employees.

b: Evidence that the crime has impaired the employee's ability to perform the basic functions to which he is assigned or is assignable.

c: Evidence that the employee's reinstatement would compromise public trust and confidence.

d: Evidence that the employee is a danger to the public or customers.

3. The record must establish that the Service has fairly considered the seriousness of the specific misconduct in light of mitigating and extenuating circumstances."

# THE ARGUMENT

The Union argument in an off-duty discipline case--usually a removal or indefinite suspension-crime case--is straightforward--that management has failed to prove any nexus or connection between an employee's off-duty conduct and that employee's Postal employment.

No matter what the employee has done off-duty, we must put forth our argument that that conduct has nothing whatsoever to do with the employee's employment. The charge could involve drug use, drug trafficking, violence, theft, or a multitude of other serious offenses. Regardless of the charge, unless there can be established a nexus between conduct away from the clock, the job and employment, our position is Just Cause cannot exist.

This is not to say that we will be successful in every defense utilizing the nexus argument; we will not. Arbitrators often excuse themselves with decisions wrapped around "moral judgment" or "societal concerns". It is also evident that some Arbitrators will view increasingly serious offenses with less and less emphasis on the nexus principle. Despite these pitfalls, we must ensure that the due process nexus protection is pursued and developed to its fullest--in every case. We must ensure that our own personal opinions concerning particular offenses are never factors in our pursuit of the nexus argument.

Remember, provisions of the Collective Bargaining Agreement permit the hiring of individuals with criminal histories. Further, managers are most often not treated so summarily as are our own Union members when off-duty misconduct occurs.

Our jobs as stewards and arbitration advocates are to provide the best possible defense. The nexus argument is a major required element in providing that defense.

# THE COLLECTIVE BARGAINING AGREEMENT

The USPS often utilizes language in Chapter 6 of the Employee and Labor Relations Manual in prosecution of off-duty conduct cases:

**EMPLOYEE AND LABOR RELATIONS MANUAL**

**661.3 Standards of Conduct**

c. Impeding Postal Service efficiency or economy.
f. Affecting adversely the confidence of the public in the integrity of the Postal Service.

**665.16 Unacceptable Conduct**

Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal employees be honest, reliable, trustworthy, courteous, and of good character and reputation. The Federal Standards of Ethical Conduct referenced in 662.1 also contains regulations governing the off-duty behavior of postal employees. Employees must not engage in criminal, dishonest, notoriously disgraceful, immoral, or other conduct predudicial to the Postal Service. Conviction for a violation of any criminal statute may be grounds for disciplinary action against an employee, including removal of the employee, in addition to any other penalty imposed pursuant to statute. Employees are expected to maintain harmonious working relationships and not to do anything that would contribute to an unpleasant working environment.

**661.55 Illegal Drug Use**

Illegal use of drugs may be grounds for removal from the Postal Service.

**666.2 Behavior and Personal Habits**

Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal personnel be honest, reliable, trustworthy, courteous, and of good character and reputation. Employees are expected to maintain satisfactory personal habits so as not to be obnoxious or offensive to other persons or to create unpleasant working conditions.

The text of the Collective Bargaining Agreement itself does not provide for a required nexus, however, in a National Level Arbitration Award, the USPS itself recognized the necessity of a nexus between USPS employment and off-duty misconduct for Just Cause to be achieved. That National level award is part of our Collective Bargaining Agreement:

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| ***Arbitrator Sylvester Garrett*** | | ***Case No. NC-NAT-8580*** |
| ***National Award*** | ***September 29, 1978*** | ***Pages 31-32*** |

"Given these fundamental changes wrought through collective bargaining, obviously departing from traditional Civil Service policies and procedures, it is inconceivable that the sophisticated negotiators for the USPS in 1971 reasonably could have believed that the suspension of an employee because of alleged commission of a crime would not be subject to a full independent review in arbitration to determine whether the suspension was for "just cause" and whether remedial action, including back pay, might be appropriate. This conclusion seems unavoidable even under the language of the last sentence in Section 3, in itself, since it requires that there be "reasonable cause" to believe the employee "guilty" of the alleged crime. In any grievance involving "just cause" for suspension in a "crimes case" the presence or absence of "reasonable cause" to believe the employee guilty would be an unavoidable first question. It also seems apparent that some alleged crimes could have no material bearing on an employee's ability to perform his or her job without embarrassment to the Service or impairment of efficiency or safety. Yet, as the Service concedes, there must be a "nexus" in any such case between the alleged crime and the employee's job with USPS. Whether such a "nexus" exists also is an obvious question under the "just cause" test. (Emphasis Added)"

**JOINT CONTRACT INTERPRETATION MANUAL – ARTICLE 16.6**

***INDEFINITE SUSPENSION – CRIME SITUATION***

Just cause of an indefinite suspension is grievable and an arbitrator has the authority to reinstate and make whole.

An indefinite suspension is subject to review by an arbitrator to the same extent as any other suspensions, which is to determine whether "just cause" for the disciplinary action has been shown. Such a review involved considering at a minimum:

(2) whether such a relationship exists between the alleged crime and the employee's job in the Postal Service to warrant suspension.

# THE INTERVIEW

It is important to establish (1) that no nexus existed, and (2) that there was no reliance on a nexus by the issuing supervisor and concurring official when the case is being investigated at the earliest stages. Management advocates will invariably attempt to establish some post disciplinary nexus at arbitration--even though the issuing supervisor probably hadn't a clue as to what the nexus principle was--much less what nexus may have existed--when the discipline was initiated and issued. Even if a management advocate can produce newspaper article after newspaper article stating the disciplined employee's name, Post Office of employment, etc., at arbitration--if the issuing supervisor did not rely upon those articles, then there was no nexus when the discipline was initiated and issued. However, without clear establishment of what the supervisor relied upon and what reasoning was behind the decision to discipline--through the interview--then management will testify at the arbitration hearing all about the nexus that is then claimed to be the reason the action was initiated.

The interview is as important in a nexus case as it is in any element of due process and Just Cause. Some examples of the interview in a nexus case are as follows:

- Mr. Doe's conduct occurred off the clock?
- Mr. Doe's conduct occurred off the premises?
- Were you present when this alleged misconduct occurred?
- How did you find out about this misconduct?
- Did you read about Mr. Doe in the newspaper? What newspaper? When?
- Do you have these articles?
- Did you hear about Mr. Doe on the radio? What radio station? When?

- Do you have audio tapes of these reports?
- Did you see Mr. Doe on television? What television station? When?
- Do you have videotapes of these reports?
- Did you receive customer complaints about Mr. Doe's continued employment? From whom? Names? In writing? When?
- Do you have these written customer complaints?
- Did Mr. Doe make any arrangements for the sale (which occurred off the clock) while he was at work?
- What evidence do you have of such arrangements? Taped telephone calls? Taped conversations?
- You based this removal solely on Mr. Doe's behavior off the clock?
- What evidence did you rely upon connecting Mr. Doe's conduct to his postal job?

We must limit management's ability to justify a discipline after the fact through establishment of a post disciplinary nexus. In this regard, the interview may be our only tool.

# THE ARBITRATORS

Since the National Level award previously cited regional arbitrators have improved and honed the nexus principle into one of the most important due process protections for employees under our Collective Bargaining Agreement. Those decisions have become the standard for expression of the principle:

***Arbitrator Bernard Cushman*** ***Case No. E7C-2A-D 6987 & 8134***
***Langhorne, PA*** ***April 3, 1989*** ***Pages 17-20***

"The larger or more substantive question in this case involves the significance of the Grievant's off duty misconduct in his employment relationship with the Postal Service. That was the basis of his removal. The mere fact that the conduct in question occurred away from the workplace and outside of working hours does not foreclose managerial authority to impose discipline otherwise justified. An employer may properly be concerned when private actions of an employee compromise the employer in a meaningful way. On the other hand, management has no roving commission to act as the guardian or supervisor of the employee's private conduct. As Arbitrator Richard Bloch has said, "Basic precepts of privacy require that, unless a demonstrable link can be established between off-duty activities and the employment relationship, the employee's private life, for better or for worse, remains his or her own." Unpublished Decision, January 17, 1981, quoted in proceedings for the 39th Annual Meeting National Academy of Ar-

bitrators -- Arbitration 1986: Current and Expanding Roles, p. 130. Arbitrator Ralph Seward has aptly stated that the off duty misconduct must have "a sufficient direct effect upon the efficient performance of Plant operations to be reasonably considered good cause for discipline" and that the employer "must show that the effect of the incident upon working relationships within the Plant was so immediate and so upsetting as to justify the abnormal extension of its disciplinary authority." General Motors -- UAW Umpire Decision C-278, also quoted in the proceedings of the 39th Annual Meeting National Academy of Arbitrators, p. 138.

***The Postal Service here failed to sustain its burden of proof showing a nexus between Grievant's off duty conduct and any sufficient direct adverse effect suffered by the Postal Service as a result thereof. Its only evidence in that regard consisted of uncorroborated hearsay, telephone complaints from anonymous customers about the Grievant's continued employment and an unidentified newspaper article. That article did not mention the Grievant's employment relationship with the Postal Service. Simply stated, the Postal Service presented insufficient probative or credible evidence that it was adversely affected in any demonstrable way by the Grievant's conduct. Implicit in the Postal Service's position is the presumption that such conduct is of itself harmful to the Postal Service. As the Court stated in Bonet, supra, such a per se approach is inappropriate. A determination can only be made on the basis of all relevant considerations and all the facts."

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| ***Arbitrator J. Fred Holly*** | | ***Case No. AC-S-21,846-D*** |
| ***Birmingham, AL*** | ***May 9, 1978*** | ***Pages 4-6*** |

DISCUSSION AND FINDINGS

This Arbitrator in Case No. NC-S-9869-D (J. Guerrero) held that when a Postal Service employee is disciplined or discharged on the basis of criminal charges such disciplinary action does not meet the just cause concept unless the criminal charges "(a) involve an on the job action, or (b) if not, it must be a job related action to the extent that it will have an adverse impact on employee or public relations, efficiency, etc., or poses a threat to Postal operations, property or personnel." This conclusion was reached on the basis of the intent of the parties when they agreed to the language incorporated in Article XVI of their National Agreement. If this is correct for situations involving criminal charges, it is equally applicable to situations in which convictions have occurred. The question is not whether an employee has been convicted of a crime and sentenced for it. Rather, the question is that of whether such an occurrence has destroyed the basis for continued employment because of one or more of the above noted adverse impacts. Therefore, it is proper to apply the foregoing principles to the instant situation.

The Grievant's conviction of first degree manslaughter, his sentencing and his subsequent placement on probation did not involve an on the job action. Neither did it involve a job related matter with an adverse impact on employee or public relations, efficiency, etc., or pose a threat to Postal operations, property or personnel. In fact, in this case the Employer does not even claim any such adverse impacts. The Employer's posi-

tion being simply that since the Grievant was convicted of a crime and was sentenced for same, there is justification for his removal. Such a position is not tenable under the provisions of Article XVI of the National Agreement. Also, the Grievant's work experience subsequent to his reinstatement from suspension indicates that he can continue as an entirely acceptable employee, and that there is no basis for anticipating any adverse impacts from his continued employment. Therefore, absent just cause for termination, his reinstatement is necessary.



DISCUSSION AND FINDINGS

The Union is correct in its insistence that Article XVI, Section 3 of the current Agreement does not grant the Employer carte blanche to immediately suspend those employees who are reasonably believed to have engaged in a criminal action for which imprisonment may occur. The Employer must not only have reasonable cause to believe that the employee is guilty of the criminal charge(s), it must also have reasonable cause to believe that continued employment, pending adjudication, would impair the efficiency of the service, or have a serious adverse impact on employee-employer relationships, or have the potential of harming public relations and/or confidence in the service, or similar undesirable consequences. In the instant case the Employer only states the conclusion that the Grievant's continued employment would impair one or more of these factors. More is required of the Employer than this. There must be a showing that such events are likely to transpire, particularly in a case such as this where the Grievant's employment record is unblemished and the Grievant's job is a behind the scenes and non-sensitive one.

"What Arbitrator Holly wrote in 1977 seems to fit Grievant's situation like a hand in a glove. In this matter there is no evidence that Grievant's continued employment in a behind the scenes job would have any impact, let alone a serious impact, on employee-employer relationships, that it would somehow impair the efficiency of the service, or that it would in any fashion impact on public confidence in the ability of the Service to fulfill its mission. Moreover, there is no showing that Grievant has anything but an acceptable discipline record.

Reliance on newspaper clippings in support of personnel actions has also been cautioned against in previous arbitrations. In CIC-4G-D 1843,Cohen, Arb., (1982), it was noted:

> I do not believe that a number of newspaper articles is sufficient evidence to Justify an indefinite suspension. Newspaper articles are known to be written for purposes of sensationalism and shock value. They are seldom presented as balanced recitations of facts, and the facts presented are not always correct. Newspaper articles taken alone could never be considered sufficiently convincing to justify a statement that they constitute reasonable cause to believe the charges contained in them.

Even if management at the Centralia facility had a foundation for a belief that Grievant was guilty of a crime for which a sentence of imprisonment could result, a conclusion that is difficult to support on the basis of the evidence in this record, a nexus, between the charges involved in the incident and Grievant's Postal Service employment, has not been established. Soon after the language contained in Article 16.6 was placed into the parties collective bargaining agreement a National Arbitration Award concluded that the Service conceded that a nexus must exist between off duty conduct for which a sentence of imprisonment might result and the Postal Service. In NC-NA-8580, Garrett, Arb., (1978), at page 32, the following is noted:

> Yet as the Service concedes, there must be a nexus" in any such case and the employee's Job with USPS. Whether such a "nexus" exists also is an obvious question under the "Just cause" test."

## CHAPTER 8

# THE ISSUE: <u>TIMELINESS OF DISCIPLINE</u>

# THE DEFINITION

That issuance of discipline must be reasonably timely in relation to the date of the alleged infraction or the date of the last absence cited.

# THE ARGUMENT

The JCIM and EL921 state that discipline . . . . "should be taken as promptly as possible . . . . " This places a burden upon the USPS to prove why a delay was somehow justified. If an incident of misconduct occurs and the USPS waits 10 days to conduct a Pre-disciplinary Interview – while gathering no evidence during that 10 day period – and then waits another 10 days to initiate the discipline, that certainly appears to fail the JCIM and El-921 provisions. We must argue that discipline is untimely whenever the action is not "<u>taken as promptly as possible.</u>" However, there is a school of arbitral thought which applies a general rule of 30 days as the normal standard for the disciplinary issuance time frame. Our CBA does not provide for 30 days and we must resist any application thereof. This is also not to say that discipline issued beyond 30 days will automatically be deemed procedurally defective by an arbitrator. But once disciplinary issuance goes beyond 30 days, the Union's argument becomes increasingly stronger that the Just Cause test of timeliness is defective and violated. Nevertheless, we must argue for the "as promptly as possible" standard.

**Management Claims of Delay When Postal Inspection Service is Investigating**

Delays in issuing discipline are sometimes blamed by management due to ongoing Postal Inspection Service/OIG investigation or "waiting for the Postal Inspection Service/OIG Investigative Memorandum".

While there may be some consideration given to such reasons from management by arbitrators, the Union must still pursue the timeliness issue. Often times, the Investigative Memorandum will reveal the OIG/Postal Inspection Service's investigation actually ended by a particular date--long before final presentation of the OIG/Postal Inspection Service Investigative Memorandum to Postal management. Other times, although the Postal Inspection Service/OIG and management claim an ongoing investigation was continuing, the facts will not support such a continuation or delay in management's issuance of discipline.

We do know that management relies heavily--sometimes 100%--on the OIG/Postal Inspection Service Investigative Memorandum (another due process issue found in Chapter 3) but there will be instances in which the Investigative Memorandum is only a small part of management's decision and

issuance of discipline. In any event, a management claim of delay due to the OIG/Postal Inspection Service Investigative Memorandum receipt must not, in and of itself, deter our due process pursuit.

Review of the disciplinary notice, the fact circumstances, and the time lapse between the alleged infraction or last absence and disciplinary issuance will reveal whether or not a timeliness argument exists and how vigorously that due process argument should be pursued.

## THE COLLECTIVE BARGAINING AGREEMENT

Under the Just Cause definition of Article 19's EL-921, the last element or test of just cause is found:

**ARTICLE 19's EL-921, - "Supervisor's Guide to Handling Grievances"**

**"Was the disciplinary action taken in a timely manner?**

Disciplinary actions should be taken as promptly as possible after the offense has been committed."

**JOINT CONTRACT INTERPRETATION MANUAL - ARTICLE 16.1**

**JUST CAUSE PRINCIPLE**

These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

**Was the Disciplinary Action Taken in a Timely Manner?**

Disciplinary actions should be taken as promptly as possible after the offense has been committed.

## THE INTERVIEW

Like the interview for "past elements not adjudicated" found in Chapter 13, the interview for timeliness of discipline will not be dispositive of fact circumstances so much as intent, involvement, and authority. We must try to uncover why a delay occurred, who was involved in the delay and whether the issuing supervisor actually had any say in causing or preventing the delay.

Examples are:

- When did you make the decision to initiate disciplinary action?
- When did you finish gathering all the facts which went into your determination to initiate disciplinary action?

- When did you last make contact with the OIG/Postal Inspection Service regarding Mr. Doe?

- When did you receive the OIG/Postal Inspection Service Investigative Memorandum?

- What information did the OIG/Postal Inspection Service Investigative Memorandum reveal to you other than what you already possessed prior to receiving the Investigative Memorandum?

- What caused the five week time period from Mr. Doe's last absence and your initiation of the request for discipline?

- You could have initiated this discipline sooner than you did?

- You were only told of the decision to remove two days before your issuance?

The interview in timeliness argument circumstances becomes valuable due to its ability to limit later revisions by management for untimely initiation and/or issuance of discipline. Again, questions on timeliness can reveal lack of involvement, intent, and authority of the issuing supervisor.

Like most people, many supervisors do not want to be blamed for that which they were not responsible. If a timeliness delay in conjunction with the Just Cause element is the subject of interview questions, it is probable a supervisor not responsible for the delay may reveal much helpful information on other aspects of the issuance of the discipline.

## THE ARBITRATORS

While not setting a definitive benchmark for untimely discipline, the reasoning and determinations of these arbitrators is helpful in support of our argument:

"The Arbitrator is also of the opinion that the discipline was untimely. The audit occurred on November 20, 1989; the Investigative Memorandum was issued on December 22, 1989; removal was recommended on January 27, 1990, but the removal notice was not issued until April 23, 1990. During this entire period, the grievant remained on the rolls and on duty. This factor indicates that he did not present a risk to postal property.

The above-noted time table shows an unreasonable delay in the imposition of discipline, and such a lengthy delay undermines efforts to prepare an adequate defense."

***Arbitrator J. Fred Holly*** ***Case No. AC-S-16,222-D***
***National Award*** ***August 8, 1976*** ***Pages 4-6***

"The record clearly establishes that the Grievant's absenteeism continued to be excessive throughout 1976 and into 1977, averaging eleven point five (11.5) percent. Moreover, her absences were highly concentrated on days either before or after scheduled off days or holidays. Yet, Management did nothing from January 1976 through January 1977 to correct the problem until the removal letter was issued on February 2, 1977. Obviously, Management abandoned its corrective action program and was totally inactive with respect to the matter for twelve (12) months. This period of managerial inaction has two undesirable and unacceptable consequences. First, it gave the Grievant a false sense of security since she could only assume that her attendance had improved to a satisfactory level. Second, it rendered the removal action punitive rather than corrective in violation of Article XVI of the National Agreement. Since Management's inaction can be viewed only as condoning the situation, the abrupt decision to discharge was both arbitrary and capricious and not in keeping with the requirements set forth in Article XVI.

***Arbitrator Walter H. Powell*** ***Case No. E7C-2A-D 28934***
***Philadelphia, PA*** ***April 2, 1991*** ***Pages 7-8***

"For discipline to be upheld the requirements of due process must be upheld. Due process requires that discipline be determined without undue delay. If the agreement is silent about time limits in the imposition of a penalty, then reasonable time limits are required. Management's right to discipline employees for failure to meet attendance requirements is not in question. However, the span of time between the last incident of absenteeism and the issuance of the Notice of Removal is unreasonable. No evidence has been introduced to suggest continued absences by the grievant since her absence on November 8th, 1989, nevertheless it took fifty-three days for the Notice of Removal to be issued.

What suddenly motivated or precipitated the supervisor to issue such a Notice of Removal after such a lengthy time period, plus the transfer of the grievant casts grave suspicion on the motives and the arbitrary and capricious act by the supervisor and the concurring authority. Timeliness in administering discipline is a constant subject of discussion between the parties. Several memorandums written by labor relations representatives suggest that after thirty days, the matter is untimely. No satisfactory evidence of a past practice exists, but the guide lines suggesting thirty days have been repeated by current personal and a former head of the labor relations department."

***Arbitrator Carl A. Warns, Jr.*** ***Case No. AB-S-10,642-D***
***Louisville, KY*** ***May 22, 1976*** ***Pages 6-7***

"In summary, Section 3 of Article XVI is procedural and the rights and obligations associated with Section 3 attach and become relevant at the time of the suspension of more than 30 days or discharge. In November, 1975, when the unfortunate accident occurred and the grievant was charged with a crime for which a sentence of imprisonment can be imposed, the Employer took no disciplinary action. The record further indicates that although Mr. Bolden was indicted, the court is retaining jurisdiction for purposes of reviewing and monitoring his rehabilitation as an alcoholic.

The record of this case reveals Management's sensitivity and concern for the welfare of employees in Dallas area who admit to having a problem with alcohol. On the other hand, to now impose an indefinite suspension in June of 1975 for an offense which occurred in November, 1974 and known to Management at that time, is not consistent with "just cause". There is no evidence that between November, 1974 and June, 1975 there was additional evidence of disruption in the work force as a result of working with Mr. Bolden, or embarrassment in any sense to the Postal Service. The truth of the matter is in my opinion that the Postal Service during this time demonstrated with the court, interest and concern for Mr. Bolden's rehabilitation. But it is too late in June, 1975, absent additional facts which are not before me to discipline the grievant for something that occurred six or seven months earlier."

***Arbitrator Robert W. McAllister*** ***Case No. C0C-4L-D 16172***
***Fox Valley, IL*** ***March 15, 1993*** ***Page 17***

The above analysis leads to the inescapable conclusion that local Management failed to act upon information which forms the basis of this removal action for almost one year. Compounding this inaction, Management made no effort to conduct its own investigation or speak to the Grievant. Instead, Management allowed the Grievant to continue her coverage under Morrow's policy which Inspector Ireland, on May 29, 1991, described as fraudulent. Thereafter, Ireland took no action after interviewing the Grievant in August 1991 and conducted no interviews until May 20, 1992, despite possessing the essential information from which a supplemental report could have been issued. When such a report was issued on June 2, 1992, Ireland composed that IM in a manner that while factual, omits any reference to the key August 1991 interview with the Grievant. Accordingly, it is apparent that by failing to conduct its own investigation, Manage-

ment was blinded as to the implications this record raises in relationship to the timeliness of instituting discipline. How can the Grievant or any other employee know what is expected of him/her if Management ignores clear improprieties for at least a year? Management was aware of the essential facts involved since at least May 29, 1991, and no later than the Grievant's motorcycle accident in June 1991. The Postal Service instructs its supervisors to take disciplinary action "as promptly as possible after the offense has been committed." the lapse in time involved in this matter is totally unreasonable and at odds with the principles of just cause. Therefore, the Grievant's removal cannot be upheld.

## Chapter 9

# THE ISSUE: DISPARATE TREATMENT

# THE DEFINITION

Issuance of discipline in a manner which is different, and/or unfair, and/or inequitable.

# THE ARGUMENT

Whenever the USPS administers a disciplinary action, a critical facet of our investigation must be whether or not the grievant is being treated in a disparate--different--manner than other employees and/or supervisors. Should other employees have--regardless of craft--similar attendance records and/or similar progressive disciplinary histories, or have committed similar infractions, then other employees should have been subject to similar, if not the same, discipline as the grievant.

The standard also applies to supervisors--although the USPS will strenuously object to comparison of a craft grievant to a manager. Notwithstanding any position taken by management that comparisons to supervisors and/or employees from other crafts is irrelevant, we must fully develop all comparisons to uncover evidence of disparate treatment. If we can establish our grievant is treated unfairly, with disparity, we have established management has failed to meet one of the critical tests of Just Cause.

# THE COLLECTIVE BARGAINING AGREEMENT

While disparate treatment is not found in Article 16, it is found in Article 19s EL-921, "Supervisor's Guide to Handling Grievances":

> **“Is the rule consistently and equitably enforced?**
>
> If a rule is worthwhile, it is worth enforcing, but be sure that it is applied fairly and without discrimination.
>
> Consistent and equitable enforcement is a critical factor, and claiming failure in this regard is one of the union's most successful defenses. The Postal Service has been overturned or reversed in some cases because of not consistently and equitably enforcing the rules.
>
> **Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?**

The following is an example of what arbitrators may consider an inequitable discipline: If an installation consistently issues 5-day suspensions for a particular offense, it would be extremely difficult to justify why an employee with a past record similar to that of other disciplined employees was issued a 30-day suspension for the same offense.

The Postal Service feels that unless a penalty is so far out of line with other penalties for similar offenses as to be discriminatory, the arbitrator should make no effort to equalize penalties. As a practical matter, however, arbitrators do not always share this view. Therefore, the Postal Service should be prepared to justify why a particular employee may have been issued a more severe discipline than others."

**EMPLOYEE AND LABOR RELATIONS MANUAL**

665.23 **Discrimination**

Employees acting in an official capacity must not directly or indirectly authorize, permit, or participate in any action, event, or course of conduct that subjects any person to discrimination, or results in any person being discriminated against on the basis of race, color, religion, sex, national origin, age (40+), physical or mental disability, marital or parental status, sexual orientation, or any other nonmerit factor, or that subjects any person to reprisal for prior involvement in EEO activity.

## 666 Prohibited Personnel Practices

### 666.1 Restrictions

666.11 **Applicability of Restrictions**

The following restrictions apply to any Postal Service employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to any employee, eligible, or applicant.

666.12 **Prohibited Discrimination**

The following provisions apply:

b. *Individual Status*. No person may be discriminated against because of race, color, religion, sex, age (40+), national origin, disability, reprisal based on protected activity, marital or parental status, or sexual orientation in connection with examination, appointment, reappointment, reinstatement, reemployment, promotion, transfer, demotion, removal, or retirement.

c. *Conduct That Does Not Adversely Impact Performance*. No person may be discriminated for or against on the basis of conduct that does not adversely impact that person's performance or the performance of others. In determining suitability or fitness of that per son, any conviction for any crime under the laws of any state, the District of Columbia, or of the United States may be taken into account.

673.22 **Prohibiting Discrimination and Harassment**

673.221 **Discrimination**

The Postal Service is committed to ensuring a workplace that is free of discrimination and to fostering a work climate in which all employees may participate, contribute, and grow to their fullest potential.

**JOINT CONTRACT INTERPRETATION MANUAL - ARTICLE 16.1**

**JUST CAUSE PRINCIPLE**

These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

**Is the rule Consistently and Equitably Enforced?**

A rule must be applied fairly and without discrimination. Consistent and equitable enforcement is a critical factor, and claiming failure in this regard is one of the union's most successful defenses.

The Postal Service has been overturned or reversed in some cases because of not consistently and equitably enforcing the rules.

Consistently overlooking employee infractions and then disciplining without warning is one issue. For example, if employees are consistently allowed to smoke in areas designated as No Smoking areas, it is not appropriate suddenly to start disciplining them for this violation.

In such a case, management may lose its right to discipline for that infraction, in effect, unless it first puts employees (and the union) on notice of its intent to enforce that regulation again. Singling out an employee for discipline is another issue. If several similarly situated employees commit the same offense, it is not equitable to discipline only one.

# THE INTERVIEW

Either before our initial review of others' records and/or circumstances or after our review, the interview is valuable in establishing whether the supervisor issuing the discipline even checked other's records/circumstances (this again goes toward the supervisor's involvement and investigation), has any knowledge of disparity or rejected any evidence uncovered. Usually, an issuing supervisor will make no effort to ensure disparity does not exist. If the supervisor makes no effort, then the investigation is flawed. If the supervisor has no knowledge yet disparity exists, then the Just Cause test is not met. If the supervisor uncovered evidence of disparity and rejected it, we want to ensure the

supervisor admits the same--and establish the test is not met. Some disparate treatment questions are as follows:

- Prior to issuing the discipline did you compare the grievant's attendance record to other employees?
- To other supervisors?
- To your own record?
- Are you aware of other employees having records similar to the grievant's? Worse?
- Are you aware of other supervisor's having records similar to the grievant's? Worse?
- Is your own record similar to the grievant's? Worse?
- You found records similar to the grievant's--were those employees also disciplined?
- You found records similar to the grievant's--were those supervisors also disciplined?
- You did not treat the grievant the same as other employees are treated under similar circumstances? With such records?

As previously stated, getting the supervisor's testimony through interviews at the earliest possible stage will be invaluable as an element of evidence and enable us to limit editorial deviation of that same supervisor in arbitration.

## THE ARBITRATORS

Authority from arbitrators gives us our best support for disparate treatment arguments--including utilizing treatment of managers for comparisons:

***Arbitrator G. Allan Dash, Jr.*** ***Case No. NC-E-12055-D***
***Alexandria, VA*** ***July 14, 1978*** ***Page 12***

"The Postal Service, in this as well as a number of other cases heard by this Arbitrator, has emphasized that its employees "are servants of the general public and their conduct, in many instances, must be subject to more restrictions and to higher standards than certain private employments." (Postal Service Manual, Part 442.12.) If such exemplary conduct is required of bargaining unit employees, it certainly is of supervisory personnel who should set good examples for their employees to emulate. The Arbitrator is persuaded that, in actively participating in a physical altercation until forcibly restrained, and in offering to continue the physical combat after duty hours, the Supervisor was not only failing to do his duty under the terms of the Postal Service Manual, but was relinquishing any claim he might have otherwise had to the role of a victim of unprovoked aggression.

It is not within the Arbitrator's jurisdiction under the Agreement to impose, or suggest, discipline of a Supervisor participant in a physical confrontation with a bargaining unit employee. But when management elects not to discipline a Supervisor in any way who was much more than a passive defender of his person in a confrontation with an employee, the Arbitrator cannot properly interpret the employee's participation, though more aggressive than the Supervisor's, as "just cause" for his discharge.

***Arbitrator Josef P. Sirefman*** ***Case No. N7C-1N-D 0027177***
***Paterson, NJ*** ***March 18, 1994*** ***Pages 10-11***

"That the difference between a Supervisor and a unit member should be of no moment when disparate treatment for the same or similar offenses is involved must be considered fundamental. Indeed, Arbitrator A. Porter in CYC-4U-D 33711 decided so in 1987; and there is the consonant NLRB decision in this case in 1990. In Supervisor Malewich's case there was an incomplete and therefore false response to the application's question on prior arrests. In addition there was a second charge against him. Yet a resolution of his removal to a 14 day suspension was the result.

As indicated, disparate treatment requires careful examination of similarities and differences in the records being compared. For this Supervisor an apparent employment period of twenty years represents a significant difference pulling in the direction that it may not be disparate treatment. But, one could also consider that, as with Fiore, the arrests or convictions occurred many years before when both were young men. A second charge on the Notice of Removal against this Supervisor was blacked out before submission to the Union. As there was an additional charge beyond arrest falsifications on the employment application, disparate treatment appears to have existed among employees in the same Northern New Jersey area."

***Arbitrator Mark L. Kahn*** ***Case No. J90C-4J-D 95070296***
***Benton Harbor, MI*** ***March 18, 1996*** ***Page 14***

"Finally, there is the matter of the Union's allegation of disparate treatment based on the cases of Supervisors Blair and Matyas. First of all, I consider their respective discipline packages to be admissible in spite of the fact that they were not presented during the grievance procedure. This is because the Union was not aware of their cases until November 1995; because the Union then provided the Employer with notice that it intended to present this material at the arbitration hearing; because the Employer did not then propose that grievant's case be remanded to Step 3 for further consideration; and because the examples of Blair and Matyas, for our purposes, are more argumentative than evidentiary. In this regard, I concur with the view of Arbitrator Joseph F. Sirefman as expressed in N7C-1N-D 0027177 decided March 18, 1994, "That the difference between a Supervisor and a unit member should be of no moment when disparate treatment for the same or similar offenses is involved must be considered fundamental." My review of the Blair and Matyas "discipline packages" suggests that these supervisors were treated far more leniently than non-supervisors are normally treated for similar

kinds of misconduct. The Postal Service should be advised that such disparate treatment is not acceptable."

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|---|---|---|
| ***Arbitrator Arthur R. Porter*** | | ***Case No. C4C-4U-D 33711*** |
| ***Denver, CO*** | ***November 7, 1987*** | ***Page 4*** |

The arbitrator holds that there is sufficient evidence to uphold the grievance on the basis of disparate treatment between a supervisor and an employee for activities that were much the same. Gambling and participating in gambling is an illegal activity and may warrant severe discipline. Two persons however, cannot receive such different penalties for the same "crime", particularly, when one is a supervisor and the other a "supervised" employee.

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|---|---|---|
| ***Arbitrator Andree Y. McKissick*** | | ***Case No. C90C-4C-D 95048650*** |
| ***Wilmington, DE*** | ***August 6, 1996*** | ***Pages 9-10*** |

II. ISSUE OF MERIT

The focus and crux of this second issue is the validity of the disparate impact argument. The Union contends that four other similarly situated postal employees failed to comply to attendance requirements with unscheduled absences, yet they were not discharged as the Grievant. A review of the evidence (PS Form 3972's) reveals that between October 1, 1994-December 23, 1994, the following unscheduled absences were attributed to these specific individuals:

(1) Turcol, L.T. has 25 unscheduled absences. (U-1 at 1)
(2) White, C.L. has 16 unscheduled absences. (U-1 at 3)
(3) Murphy, K.F. has 15 unscheduled absences. (U-1 at 5)
(4) Golden, J.D. has 8 unscheduled absences. (U-1 at 7)
(5) Theresa Richardson, the Grievant, has 5 unscheduled absences. (U-2 (A) and (B))

Moreover, the record indicates that the Grievant was a Union Steward. This apparent evidence is reflective of a clearly disproportional amount of unscheduled absences in relationship to others, who were not also issued a Notice of Removal, in comparison to the Grievant. Such compelling evidence coupled with the fact that the Grievant was a Union Steward presents a glaring picture of unfair treatment.

Article 16, Section 1 of the Agreement states, in part, as follows:

> [A] basic principle shall be that discipline should be corrective in nature, rather than punitive. NO EMPLOYEE MAY BE DISCIPLINED EXCEPT FOR JUST CAUSE...

In applying this language with the facts at hand, this Arbitrator finds the presence of disparate treatment when the governing Article of the Agreement operates in an uneven and unfair manner effecting one employee differently than another. Accordingly, this Arbitrator finds that the Grievant was not removed for just cause.

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"The Union also argues that the Grievant was treated in a disparate manner. Both during the grievance procedure and at the hearing, the Union argued that other employees, including the supervisor, had attendance records equal to or worse than the Grievant's. At no point during the grievance procedure or at the arbitration hearing did the Service rebut this contention. The Chief Steward testified as to the attendance records of several employees, specifically. The Union's argument of disparate treatment was not one of surprise. The Arbitrator must draw an adverse inference from the Service's failure to respond to the argument of disparate treatment in the grievance procedure and at the hearing. The fact that the Service failed to respond during the grievance procedure may very well have prevented it from responding at the arbitration hearing. The Arbitrator notes that during the grievance procedure, the Union requested and received a copy of the supervisor's attendance record for the year 1994. According to the testimony, the Union designee was shown the supervisor's 3971s; that he presented an analysis of the 3971s during the grievance procedure; and that this analysis was not disputed by the Postal Service during the grievance procedure or at the arbitration hearing. The Union also introduced a Step 4 settlement that makes such information relevant during the grievance procedure. According to the analysis of the supervisor's attendance record, during the year 1994, she incurred unscheduled absences on twenty-three (23) days arising out of thirteen (13) instances, including two (2) holidays. Additionally, the supervisor was late on ten (10) occasions, being late thirty (30) minutes or more while returning from lunch on four (4) occasions and reporting thirty (30) minutes or more late to work on two (2) occasions. The record indicates that the supervisor did not receive discipline for failing to maintain a regular schedule. Also, there was no evidence that the supervisor worked under a different attendance program than the Grievant. Thus, there is legitimate concern when the record of the person issuing the discipline is substantially no better then (sic) the person receiving it. When a supervisor incurs sporadic and unscheduled absences, this provides employees with notice that such conduct is acceptable. Just as shop stewards are held to a higher standard of conduct, so too are supervisors. What is most interesting is that on the day that the supervisor claims she gave the Grievant a predisciplinary interview, her attendance analysis shows that she reported to work late. Based on these facts, the Arbitrator finds that the Grievant was treated in a disparate manner. As such, the Advocate for the Postal Service was again deprived of another necessary element of just cause, that being an even-handed application of the rules and regulations regarding attendance."

2. Disparate Treatment

The additional shortcoming of the removal action herein is the disparity in disciplinary treatment for comparable acts. It has been well recognized by arbitrators over the years that just cause requires that discipline under a given rule must be applied with a general sense of equality. As stated by Arbitrator Daugherty in the classic case of Enterprise Wire Co., 46 LA 359 (1966), the question to be examined is this: Has the employer "applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?" An answer of "no" "warrants negation or modification of the discipline imposed." Id. This is not to suggest that an employer may not treat employees who commit the same infraction differently because of their employment histories or other legitimate distinctions. Alan Wood Steel Co., 21 LA 843 (Short, 1954). Where there is no justification for disparity in penalties for similarly situated employees, however, just cause may be lacking.

The Union has presented an impressive series of instances in which employees in this facility have engaged in acts of violence but were not removed. The USPS did not cite any example of violent conduct that led to discharge and did not present information to rebut the Union's basic case of disparate treatment. The USPS offered no justification for why it discharged Grievant, a long-term employee with a clear record, even though it had imposed only a suspension on an employee who allegedly attempted to choke a co-worker, imposed a lesser penalty on two employees who assaulted each other, imposed a suspension reduced to a letter of warning on an employee who punched a co-worker in a darkened stairwell, and imposed a suspension reduced to a letter of warning on an employee who threatened his supervisor that he would "go home and get a gun." Moreover, there was no evidence of a change in policy or enforcement principles under which discharge would be automatic or more readily sought in instances of violence.

The USPS responds only that the cited disciplinary decisions were not made by the supervisor or manager involved in this case and therefore cannot be used to establish a case of disparate treatment. The USPS offered no evidence of a need for stricter application of policy in the maintenance department and thus relies simply on the theory that each supervisor or each manager may apply his or her own chosen degree of discipline regardless of the manner in which comparable infractions have been handled by their colleagues relative to employees in the same facility but not in the same job description. The principle of equal

treatment cannot be considered so narrowly. Otherwise, an employer can absolve itself of overall responsibility for fair application in a given worksite, allowing pockets of rigidity to exist alongside those of leniency, subjecting workers to a significant sense of inequity and uncertainty. Evenhandedness is required not just in the department but also in the facility.

In USPS and APWU, Grievant Washington, Case No E0C-2P-D 5879 (Cushman, 1993), Arbitrator Cushman rejected the "same-supervisor" argument, calling it "unsound," and stating:

Such a narrow limitation of Postal Service responsibility for dissimilar treatment of employees in the same facility is unrealistic...[and]incompatible with arbitral concepts of fairness as an element of just cause as well as the realities of industrial relations. Employer responsibility may not be so narrowly cabined.

In this regard, the Union's citation of Article 16.8 is persuasive; certainly the requirement that installation head or his or her designee serve as the concurring official has, in part, the function of ensuring consistency. The installation head at this facility has delegated this function to the department heads, but individuals at this level of management should be aware of or have access to information regarding facility-wide discipline for comparable actions.

The arbitrator attributes no ill will to Supervisor Junius. He felt the weight of workplace violence on his shoulders. He had not been faced with such issues before. He did not engage in intentional discrimination, but his imposition of discipline was overzealous and cursory, and it was so out of step with the norm in this workplace that it is unacceptable. Had there been a proper pre-disciplinary interview in this case with probable Union involvement, Mr. Junius might have learned of the other situations and might have been able to better gauge the proper degree of discipline.

## CHAPTER 10

# THE ISSUE: HIGHER LEVEL CONCURRING OFFICIAL AS STEP 2 DESIGNEE

# THE DEFINITION

Whenever the same manager--i.e., the Postmaster/Installation Head Designee--acts as the Article 16.8 Higher Level Reviewing and Concurring Official and the Grievance/Arbitration procedure's management designee at Step 2.

# THE ARGUMENT

The EL-921, "Supervisor's Guide to Handling Grievances", provides for a division of duties between the Article 16.8 Higher Level Reviewing and Concurring Official and the Grievance/Arbitration procedure's Step 2 designee.

In this way, the grievant and grievance receive a more impartial review of the grievance at Step 2. It is not reasonable to expect that a manager who had reviewed, concurred and determined Just Cause existed in a notice of removal can then separate himself from that role to independently and objectively discuss the grievance at Step 2. Further, the real possibility of resolution from that Step 2 manager cannot be expected to exist. The EL-921 contemplated such a dilemma. Its intent provides for the separation of the Higher Level Reviewing and Concurring Official and Step 2 designee into two individuals so some semblance of impartiality may exist.

# THE COLLECTIVE BARGAINING AGREEMENT

**Article 16 DISCIPLINE PROCEDURE**

"**Section 8** Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

In associate post offices of twenty (20) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken."

**Article 15 Section 2 Step 2c**

"The installation head or designee in Step 2 also shall have authority to grant or settle the grievance in whole or in part."

**Article 19's EL-921, - "Supervisor's Guide to Handling Grievances"**

"Therefore, it is crucial that the supervisor not only take good notes during the Step 1 discussion, but also advise both the reviewing authority and the designee for Step 2 that a grievance has been filed. Since the reviewing authority thoroughly reviewed the proposed discipline before it was initiated, that person will be a key source of information for management's Step 2 designee. There must be a clear channel of communication between these two individuals.

D. Role of the Step 2 Designee

The reviewing authority looks at the proposed discipline before it is imposed and concurs with the proposed action, based on the facts supplied by the supervisor. On the other hand, the Step 2 designee must look at both sides of the coin in an effort to resolve the grievance at the local level.

A situation may arise where the Step 2 designee finds the discipline either unwarranted or too severe, based on the facts and evidence presented at the Step 2 discussion. If so, the Step 2 designee should thoroughly discuss the case with the supervisor involved before rendering a decision. Step 2 designees must not handle grievances as though they were "rubber stamping" decisions that have already been made. Also, the Step 2 designee must not accept without question all statements of facts or opinions by other management personnel regarding the case, nor assume automatically that the statements of facts or opinions forwarded by the union or grievant are fabrications or highly biased. Statements of facts by either party should always be documented.

Except to check out new facts which may be presented at the Step 2 discussion, the Step 2 designee will not have to develop management's case if the reviewing authority and supervisor involved have done their homework. The primary responsibility of the Step 2 designee is to review the case to determine whether just cause exists for discipline and, if so, whether the degree of discipline is appropriate."

**JOINT CONTRACT INTERPRETATION MANUAL - ARTICLE 16.1**

**JUST CAUSE PRINCIPLE**

These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

**ARTICLE 16.8**

**CONCURRENCE**

It is normally the responsibility of the immediate supervisor to initiate disciplinary action. Before a suspension or removal may be imposed, the discipline must be reviewed and concurred in by a manager who is a higher level than the initiating or issuing supervisor. This act of review and concurrence must take place prior to the discipline being issued.

While there is no contractual requirement that there be a written record of concurrence, as a practical matter, it is best to establish a record of the concurrence (by the concurring official signing/dating the discipline or disciplinary proposal).

**NATIONAL ARBITRATION CASE NO. E95R-4E-D 01027978 - Arbitrator Eischen**

Contrary to the position advanced by the Postal Service in this case, however, that process of review and concurrence contemplated by Article 16.6 is not a ministerial formality or a mere technical "laying on of hands" by the reviewing/concurring official. The requirement of a separate and independent second step of review and concurrence by the higher authority is not met by just a declaration of agreement with the first step supervisor's proposed disciplinary action. Compliance with Article 16.6 requires a substantive review of the mater by the higher authority in light of all the current information and the higher authority's concurrence with imposition of the disciplinary action proposed by the supervisor.

**ISSUE NO. 1**

Article 16.6 Review of Discipline of the Extension to the 1995-1999 USPS-NRLCA National Agreement:

b) Is violated if there is a "command decision" from higher authority to impose a suspension or discharge;

c) Is violated if there is a joint decision by the initiating and reviewing officials to impose a suspension or discharge;

e) Is violated if there is a failure of either the initiating or reviewing official to make an independent substantive review of the evidence prior to the imposition of a suspension or discharge;

**ISSUE NO. 2**

(a) Proven violations of Article 16.6 as set forth in Issues 1(b), 1(c) or 1(e) are fatal. Such substantive violation invalidates the disciplinary action and requires a remedy of reinstatement with "make-whole" damages.

# THE INTERVIEW

Questions regarding this issue prior to the Step 2 meeting may trigger a management decision to redesignate the Step 2 designee and thus negate our argument on the two roles assumed by the same individual. Based upon knowledge of the individual(s) involved, resolution history, and nature of the discipline, a decision must be made as to whether or not the Union wants to attempt to influence a change in designation. Perhaps the Union believes a real chance for resolution would exist if the designation was changed. If that were so, then an interview bringing out our position that no division is a due process violation may result in the desired redesignation. If it did not, the due process issue would still exist. If the Union believes a redesignation would not result in resolution, then an interview would only provide management an opportunity to redesignate and forestall the Union argument on the issue. In that case, it would be most beneficial to raise the issue at Step 2 in writing with the designee who was also the Higher Level Reviewing and Concurring Official. Should that manager attempt to cancel the Step 2 meeting (unlikely), then our position would be that that was the Step 2 meeting with the Step 2 designee. We would not meet again and would appeal to Step 3 with our due process argument intact.

In the event we attempt to orchestrate a change of designation, the following are some **INTERVIEW** examples:

- You were the Higher Level Reviewing and Concurring Official on Mr. Doe's removal?
- You also are to be management's Step 2 designee for the grievance on Mr. Doe's removal?
- Are you aware that the EL-921 requires the Higher Level Reviewing and Concurring Official and Step 2 designee to be two separate individuals?
- Are you aware that the separation provides check and balance due process to the grievant?
- Are you aware you are creating a procedural defect for management by assuming both roles?
- Are you aware there is arbitral history supporting the Union on this issue?

We know the basic principle of Article 15 is to resolve grievances at the lowest possible step. It may seem contrary to that principle if we knowingly meet with a manager at Step 2 who was the Higher Level Reviewing and Concurring Official and who we have reasonable expectation will deny the case. However, when developing defenses, we must utilize each at our disposal. The reality is that

this defense will in most cases prove much more valuable than the slim possibility of resolution by a redesignated manager at Step 2.

## THE ARBITRATORS

The following excerpts support our position on the EL-921's separation of Higher Level Concurring Official and Step 2 designee:

***Arbitrator Rose F. Jacobs*** ***Case No. N7C-1R-D 39209 & N0C-1R-D 1037***
***Buffalo, NY*** ***December 4, 1991*** ***Pages 24-27***

"Therefore, based upon all the facts and circumstances of this case as a whole, the emergency placement action and the removal appear to have been contractually proper under Article 16.7 of the National Agreement. However, in mitigation the Arbitrator is cognizant that the Union has raised a very relevant and serious procedural issue in this case -- whether certain enumerated procedural defects that existed were prejudicial to the Grievant thereby denying him due process. Management's own handbook, the EL-921 Supervisor's Guide to Handling Grievances, page 8(D) - role of the Step 2 designee, provides:

. . . A situation may arise where the Step 2 designee finds the discipline either unwarranted or too severe, based on the facts and evidence presented at the Step 2 discussion. If so, the Step 2 designee should thoroughly discuss the case with the reviewing authority and the supervisor involved, before rendering a decision. Step 2 designees must not handle grievances as though they were "rubber stamping" decisions that have already been made. This will not be tolerated. Also, the Step 2 designee will not accept without question all statements of facts or opinions by other management personnel regarding the case, nor assume automatically that the statements of facts or opinions forwarded by the union or grievant are fabrications or highly biased. . . . (emphasis added).

***The Record in this case clearly substantiates the Union's arguments that Mr. Walter Ratajczak, Postmaster of the Hamburg Post Office, by his own admission, did in fact act in several conflicting capacities as charged by the Union when

**a.** he served as concurree in the off-duty-emergency-placement discipline to Kenneth Nowak on May 8, 1991 and then served as the Step 2 designee in that discipline, and when

**b.** he again served both as the concurree and Step 2 designee in the removal action dated July 25, 1991.

As directed in EL-921, "The primary responsibility of the Step 2 designee is to review the case to determine whether just cause exists for discipline and, if so, whether the degree of discipline is appropriate." Management's Handbook EL-921 further directs its

supervisors that they "have the responsibility to be firm but fair in handling grievances" and they "must always be reasonable in their dealings with employees and the Union."

Based upon the foregoing language, it is noted that the Union and the Grievant are entitled to an independent review of the discipline imposed by the Postal Service. It is abundantly clear from the evidence that such an independent review could not possibly have been accorded Mr. Noward under the circumstances here described. Therefore, if a question of procedure in the disciplinary process arises, as here, or if the evidence demonstrates a procedural problem of any nature whatsoever, the Postal Service would then run the risk of an adverse decision if it has not presented proper evidence of the regularity of the procedure, and the discipline would therefore fall."



"The Union contends that it was improper for Mr. A. G. Hewlett of Labor Relations to have taken a role in deciding whether to discipline the Grievant in the first place, and then determining what the penalty would be, and lastly making the Step 2 decision. I agree that the principle of due process is strained when a person having an active role in issuing the removal also decides the case on appeal in the grievance steps. In the present case, Mr. Hewlett acted in both of these capacities."

## CHAPTER 11

# THE ISSUE: <u>DOUBLE JEOPARDY / RES JUDICATA</u>

# THE DEFINITION

An employee is disciplined twice based upon the same fact circumstances. This is prohibited by the principle of **Double Jeopardy.**

An employee is disciplined again following resolution of grieved discipline for the same infraction/fact circumstances. This is prohibited by the principle of **Res Judicata.**

# THE ARGUMENT

An employee may only receive discipline once for an infraction. Any time an employee is disciplined twice, that employee is subject to "double jeopardy". Black's Law Dictionary defines Double Jeopardy as:

> "**Double jeopardy**. Common-law and constitutional (Fifth Amendment) prohibition against a second prosecution after a first trial for the same offense. People v. Wheeler, 271 Cal.App. 205, 79 Cal.Rptr. 842, 845, 271 C.A.2d 205. The evil sought to be avoided is double trial and double conviction, not necessarily double punishment. -- Breed et al. V. Jones, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346."

An employee receives a letter of warning for "Failure to be Regular in Attendance". A month later, the employee receives a seven day suspension for the same charge. In the suspension notice of the 11 absences cited, 8 were also cited in the prior letter of warning. The employee is being disciplined twice for what are essentially the same fact circumstances and instances of attendance irregularity. This violates the Double Jeopardy principle.

The principle of "Res Judicata" is also applicable in disciplinary instances in that once an employee receives discipline and the matter is resolved through resolution with the Union, the employee may not be disciplined again for the same infraction/fact circumstance or record of absences. Black's Law Dictionary defines Res Judicata as:

> **"Res Judicata.** A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. Matchett v. Rose, 36 Ill.App.3d 638, 344 N.E.2d 770, 779."

An employee receives a letter of warning for "Failure to be Regular in Attendance." A grievance is filed and resolved reducing the Letter of Warning to an official discussion. A month later the employee receives another letter of warning citing the same absences and additional occurrences. Resolution of the prior discipline bars management from disciplining the grievant for the previously cited record--this is the Res Judicata principle.

The principles of Double Jeopardy and Res Judicata often are interrelated and both should be cited when management issues discipline based upon that which was previously resolved and/or when management disciplines twice for the same infraction/fact circumstances.

## THE COLLECTIVE BARGAINING AGREEMENT

No language exists in our Collective Bargaining Agreement which specifically addresses Double Jeopardy or Res Judicata. However, the aforementioned principles from Black's Law Dictionary should be cited.

## THE INTERVIEW

As with many of our due process interviews, this interview under Double Jeopardy/Res Judicata will not so much establish the fact that Double Jeopardy/Res Judicata exists as establish the intent of the supervisor as well as his role, involvement, and investigation:

- You issued Mr. Doe a fourteen day suspension one month ago citing the same absences you now have cited in this Notice of Removal?
- Were you aware you had cited these absences previously when you included them?
- You intended to discipline Mr. Doe twice for these absences?
- You did not intend to discipline him twice?
- You did not check the record carefully enough?
- You were given the Notice to sign and did not believe the record included previously disciplined absences?
- You believed because the suspension had been reduced to a letter of warning that Mr. Doe had not received enough punishment for the absences?
- You believed another discipline citing the same absences would better correct Mr. Doe's attendance irregularity?
- You rescinded and reissued this removal because the Union made you aware Mr. Doe was being disciplined again based upon absences for which he had already received discipline?

- You knew the previous discipline was resolved with the Union, yet you issued further discipline based upon the same infraction?

# THE ARBITRATORS

Arbitral reference is clear that the Double Jeopardy/Res Judicata principles protect the basic due process right of an employee to expect only one discipline per infraction/compilation of record thus enabling the employee and Union to defend against that action to a conclusion:

***Arbitrator Lawrence R. Loeb*** ***Case No. C90C-1C-D 940 17643***
***Harrisburg, PA*** ***November 15, 1994*** ***Pages 8-16***

"A common thread which runs through many of these decisions is that the Service has the right to rescind a disciplinary action and may do so with impunity, but only so long as the parties are not actively involved in trying to resolve the matter through the grievance procedure. To hold otherwise, according to these decisions, would radically alter the system the parties designed to resolve disputes and subvert the principle that grievances are to be resolved at the earliest possible step of the grievance procedure. It was to effectuate that purpose that the parties agreed that both the Union and the Service would make a full disclosure at the second step of the grievance procedure of all of the facts, issues and contractual provisions they were relying upon to support their respective positions.***

***To give the Service the right to rescind a disciplinary action once the Union makes full disclosure by presenting all of its arguments including those that point to procedural defects in the processing of the discipline perverts the grievance process because it gives Management the advantage of being able to correct the defect and finish the discipline by reissuing it. At that point, winning, rather than negotiating and the integrity of the collective bargaining process, becomes of paramount importance. That was not the way the signatories to the National Agreement intended the process to act. At least it is not when viewed against the admonition in Article 15 that grievances are to be settled at the earliest possible stage of the grievance procedure and that to accomplish that end there must be full disclosure no later than the second step of that procedure.***

***In short, there is no blanket prohibition against the Service rescinding a discipline and subsequently reissuing a new discipline on the same underlying set of facts even if in doing so it corrects a procedural defect. The limitation is that it cannot do so if the Service learns of the defect from the Union which had a contractual duty to raise the issue during the grievance process and did so in a manner which leaves no doubt concerning the specific nature of the defect. When it does, the conclusion must be that the Service took advantage of the information the Union provided."

"Whether the Letter of Warning for being out of tolerance was rescinded or not, any further discipline for the same shortage is improper and unjust. If the Letter of Warning was not rescinded, then the grievant was disciplined twice for the same infraction. If the Letter of Warning was rescinded, the act of rescission resolved the matter. As concluded by Arbitrator Larney in Case No: C1C-4E-D 14581 . . . . "the more accurate defense is one of res Judicata, rather than double jeopardy, as the Employer action of withdrawing the initial 5 day suspension had the effect of settling the matter of invoking discipline."

***Arbitrator James E. Rimmel*** ***Case No. E7T-2P-D 28213***
***Merrifield, VA*** ***October 12, 1991*** ***Pages 16, 17, 18***

". . . as well as the rescission notice issued by Management under date of 10 January 1990, suffice in this regard in this instance . . . It is for the same alleged acts of misconduct premised upon the same factual circumstances that grievant was again told on 6 February 1990 that he was to be fired. This is so even though the initial action had been rescinded, without reservation, by Management following the filing and processing of a grievance challenging that action. This, clearly, is double jeopardy for Management was attempting to twice fire grievant for the same alleged act of misconduct. This just cannot be allowed to stand and does not support the finality of the grievance settlement objective established under the parties' Agreement."

***Arbitrator John C. Fletcher*** ***Case No. C0C-4M-D 12920 & C0C-4M-D 16271***
***Coleman, MI*** ***May 1, 1993*** ***Page 9***

"The Arbitrator is reluctant to conclude that under the doctrine of double jeopardy, any time an Article 16, Section 2, discussion occurs, the Service is thereafter precluded from pursuing further disciplinary action on any of the subject matters discussed. However, in this case it must (sic) concluded that the formal discussion the Postmaster had with Grievant on March 9, 1992, foreclosed all future disciplinary action on the matters discussed because the matters were treated as minor and anything developed in the Inspection Service investigation subsequent thereto has not provided additional new information, facts are not substantially different from those understood to be correct by the Postmaster, or that the money order handling was not minor mistake. Accordingly, on this record it must be concluded that the Service violated due process requirement of the Agreement when it proceed (sic) to effect the removal of Ms. Hegyi on matters which were the subject matter of a Article 16, Section 2, Discussion with the Postmaster."

"Section 1.

The Removal. It is a fundamental principle that under "double jeopardy" concepts, once discipline for a given offense has been imposed, the level of discipline cannot thereafter be increased. In the instant case the Service imposed a thirty-day corrective discipline suspension. Upon later reflection and investigation the Service increased the discipline to one of removal, even citing in the notice of removal that the thirty-day suspension constituted an element of the Grievant's past record. The facts and charges contained in the thirty-day suspension are exactly the same as those contained in the removal. Therefore, this case falls directly under the double jeopardy principle which is incorporated into the just cause provision of the Agreement."

***Arbitrator Gerald Cohen*** ***Case No. C4C-4H-D 5831***
***Kansas City, KS*** ***February 21, 1986*** ***Page 8***

"I believe that the decision in this grievance should be based on the issue raised by the Union of the effect of filing another disciplinary action based on the identical set of circumstances which resulted in a previous disciplinary action that was grieved and settled. The Union has argued that it constitutes double jeopardy to redicipline (sic) an employee for the exact same set of facts that had resulted in a prior discipline which was grieved and settled.

It should be noted that the concept of double jeopardy is entirely one of criminal law. however, the concept is used in civil matters involving employment, such as here, because people are familiar with the notion that it is basically unfair to bring the same charges twice. I agree with the Union. The Postal Service, having used Grievant's criminal charges to issue a disciplinary action, and then having settled that action, violates fundamental concepts of fairness by reinstating the charges shortly thereafter."

## CHAPTER 12

# THE ISSUE: DISPARATE ELEMENTS OF DISCIPLINE RELIED UPON FOR PROGRESSION

# THE DEFINITION

When management relies upon elements of discipline--not of a like nature--to create a progressive disciplinary history against an employee.

# THE ARGUMENT

An example of this issue is as follows: An employee has a letter of warning and a seven day suspension for "Failure to Meet the Attendance Requirements of the Position". Now the employee receives a fourteen day suspension for parking in a supervisor's parking space. A disciplinary history of attendance is in a category separate from instances of "misconduct" or "behavior". So too would be a disciplinary history for out of tolerance results due to a window clerk's overage/shortages. Neither the attendance nor the overages/shortages can reasonably be considered misconduct--or behavioral offenses--and these, at least, reasons for discipline must not be lumped with misconducts or behavioral offenses in any progressive disciplinary history.

# THE COLLECTIVE BARGAINING AGREEMENT

While there is no specific language requiring different disciplinary progressions based upon disciplinary category, the following language will support our position:

**ARTICLE 16 DISCIPLINE PROCEDURE**

**"Section 10 Employee Discipline Records**
The records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years."

**ARTICLE 19's EL-921, - "Supervisor's Guide to Handling Grievances"**

**"B. Disciplinary Procedures**
The main purpose of any disciplinary action is to correct undesirable behavior on the part of an employee. All actions must be for just cause and, in the majority of cases, the action taken must be progressive and corrective.
If minor offenses occur, discussion with the employee may be effective in correcting deficiencies. In such a case, let the employee know what the problem is. Be specific. Cite examples and let the employee know what is expected. You have a responsibility

to encourage employees to correct their shortcomings. Let the employee talk--an interchange may be all that is needed. Follow up to make sure the discussion was effective. If the employee corrects the shortcomings after this discussion, let it be known that you appreciate the improvement.

What happens if the employee's behavior does not improve? A second discussion is sometimes advisable, or formal disciplinary action may be initiated through issuance of a letter of warning or suspension. Remember, your job is to handle disciplinary actions so they are corrective and not punitive.

In suspending an employee, use extreme caution in convincing yourself that the penalty is appropriate for the offense. Progressively longer suspensions may be in order to correct a situation. When these fail, discharge should be considered. Before you take such action, review thoroughly:

Is it for just cause?

Have we made attempts to correct the employee's behavior?

Have we taken prior progressive disciplinary action?

Is the decision based upon objectivity and not emotionalism?

**E. Investigation**

As previously discussed, when an employee commits an offense which seems to warrant discipline, the supervisor must avoid rushing into a disciplinary action without first investigating. The need for an investigation to meet our just cause and proof requirements is self-evident. However, the employee's past record must also be checked before any disciplinary action is considered. This is obviously necessary if we are to abide by the principle of progressive discipline.

**F. Items for consideration in assessing discipline include but are not limited to:**

The past record of the employee; and/or other efforts to correct the employee's misconduct."

# THE INTERVIEW

The interview should be used to establish that the supervisor gave no consideration to the disparate nature of the past disciplinary record of the employee versus the current "offense" or record or occurrence. The interview should also draw the supervisor into a position where we are assisted in establishing the punitive intent of such coupling of disparate elements of record. Some examples are as follows:

- When you formulated the Notice of Removal, you included the past elements of discipline cited on page 2?
- And none of those elements of record were related to either Charges 1 or 2 in your Notice of Removal?
- Has Mr. Doe ever been disciplined in the past for an offense similar to Charges 1 or 2?
- You didn't consider any past elements of discipline related to Charges 1 or 2 did you?
- These charges--1 and 2--have no prior disciplinary history of a similar nature on which they were based?
- If these past elements were unrelated what role did they play in your disciplinary decision?
- If the grievant has never been disciplined for any infraction even remotely related to Charges 1 or 2, how can this removal for Charges 1 or 2 be considered progressive by you?

Through this interview, we are building the foundation for our disparate elements of record argument.

# THE ARBITRATORS

Management will argue the Collective Bargaining Agreement does not provide for "similar nature" progression and Article 16 does not. However, there is arbitral support for the Union's position that disparate "offenses" in some cases--and in attendance discipline in particular--should be categorized and progressively disciplined separately. Those decisions establish the basis for our strongest arguments:

***Arbitrator Robert B. Moberly*** ***Case No. ACS26762D***
***Columbia, SC*** ***March 22, 1979*** ***Page 9***

"Third, the prior discipline of Grievant, especially the suspensions, has been aimed primarily at Grievant's AWOL and poor performance rather than excessive use of sick leave (although recognizing that certain of the discipline prior to the suspensions dealt with sick leave as well as AWOL). Since Grievant has not since been AWOL and there

is no complaint as to her performance, it appears that the prior corrective discipline has been effective in eliminating the primary complaints concerning Grievant's behavior."

***Arbitrator Wayne E. Howard*** ***Case No. E7N-2N-D 569***
***Cincinnati, OH*** ***March 31, 1988*** ***Pages 8-9***

"The failure of the Service to give the grievant any significant disciplinary warning that he should be removed for attendance problems is presumably explained on the basis of a local policy which does not separate one infraction from the other, but considers the "whole man" and the "whole record." Yet such a policy cannot be relied upon to escalate the disciplinary penalty to removal for an offense which the Service has traditionally considered to be subject to the tenets of progressive discipline. Barring a clear notice in the grievant's last chance agreement which returned him to work that attendance problems would subject him to discipline including removal, he is entitled to progressive disciplinary treatment for attendance problems. The grievant's prior problems dealt with failure to follow instructions, route deviation, use of unauthorized overtime and the like. Warnings against such conduct were explicitly given the grievant, but the last chance agreement contains no language which can be said to have advised him of potential attendance problems, despite the fact that the Service is relying upon a work period prior to the last chance agreement to support its instant action."

"The Union's contention that unrelated infractions should not be considered is valid when, as in the cited opinion, the reason for discharge was a physical assault while the past record covered parking violations, AWOL, route deviations and an unauthorized stop."

***Arbitrator Andree Y. McKissick*** ***Case No. C90C-4C-D 95042199***
***Pittsburgh, PA*** ***August 20, 1996*** ***Pages 13-15***

"It is particularly important to note that the primary subject matter and common denominator of this grievance is absenteeism. Absenteeism almost always requires the application of progressive discipline. That is, is the gradual process of giving notice to a grievant in successive, but progressively stricter manner, done through a series of steps in the disciplinary process. It is interesting to note that the applicability of progressive discipline to absenteeism is specifically cited in the "Pittsburgh Cluster, 1994 Leave Regulations" (M-8 at page 2) which the Employer claims to have sent to the Grievant prior to the issuance of the "Notice of Removal". These Leave Regulations distinctly point out the four steps of progressive discipline.

The omission of the Employer to utilize progressive discipline by not issuing the Grievant either: (1) a Letter of Warning, and/or (2) a 7-day Suspension and/or (3) a 14-day suspension prior to the most severe penalty, "Notice of Removal", lacks fundamental due process and fairness. Intrinsically connected to due process is the analysis of just cause, a required element, the predicate for a valid removal. Accordingly, this Arbitrator finds that the issuance of a "Notice of Removal" requires first that the above preceding steps of progressive discipline be applied for this type of dispute, before removal can issue as cited by the Employer's own exhibit in M-8."

***Arbitrator Elliott H. Goldstein*** ***Case No. C7C-4D-D 7711***
***Chicago, IL*** ***May 3, 1989*** ***Pages 11-13***

"I find that it is extremely important to the resolution of this case that Grievant received no actual prior discipline for unsatisfactory work performance; for failure to follow instructions; or other behaviors logically relating in any way to incompetency and poor work performance or other derelictions of duty outside of attendance problems. I am of course familiar with the fact that it is the position of the Postal Service that all violations of Management rules or derelictions of duty may be aggregated or considered in a lump as an employee progresses up the disciplinary ladder. At some point, Management strongly contends, it is fair to reach a conclusion that an employee is "generally" incorrigible, and that there is just cause to remove him or her if the employee is at the appropriate point on the progressive discipline grid. Without generalizing beyond this case, I disagree with that broad claim of the Employer when all prior discipline issued involves attendance, which I believe is in a special category of work-related offenses.

It seems to me that arbitrators generally, as well as employers and unions, have traditionally distinguished between attendance problems and other areas of rule violations, including deficient performance or behavior at work. One reason is the commonness of attendance violations by employees. Another is the lack of notice of the fact that termination is imminent for failure to adequately perform when, as in this case, no discipline had ever been issued for anything but attendance."

## CHAPTER 13

# THE ISSUE: PAST ELEMENTS OF DISCIPLINE NOT ADJUDICATED YET RELIED UPON IN SUBSEQUENT DISCIPLINE

# THE DEFINITION

When management issues discipline and in that disciplinary notice it includes, as an employee's past record, elements of discipline which are still in the Grievance/ Arbitration process and "live" for adjudication.

# THE ARGUMENT

Whenever management issues discipline and bases that action on elements of disciplinary record not yet finalized, management does so at its own peril. For example, management issues a fourteen day suspension for "Irregular Attendance" and for progressive disciplinary purposes, relies on two previously issued actions; a seven day suspension and a letter of warning. Both of these disciplines were also issued for irregular attendance, but neither has been adjudicated, that is, both were grieved, have not been resolved, and are awaiting arbitration. Management, in relying on these non-adjudicated past elements of the grievant's record, is gambling that the disciplines will be upheld and not modified or overturned either through grievance resolution or in arbitration.

Should, for instance, the letter of warning be upheld in arbitration, but the seven day suspension be overturned, then management would have an employee with a fourteen day suspension pending discussion in the Grievance/Arbitration procedure, or pending arbitration, with only a letter of warning as a past element of progressive discipline. In that case, the Union is arguing that, at worst, the fourteen day suspension should be a seven and any discussion or resolution of the fourteen day should really be discussion or resolution of a seven day down to a lesser penalty.

At arbitration, the Union must address the fourteen day as a seven day and argue that the arbitrator must view, at the least, that the fourteen should be a seven and any reduction by the arbitrator should be from seven days down; not from fourteen days down.

In those instances in which, say, a removal is heard before an arbitrator prior to "live" past elements of lessor discipline being adjudicated, then the Union's argument is that the arbitrator must consider any "live", unadjudicated past elements of discipline in the removal notice as non-existent. The reasoning being that without knowing the final adjudication and with the challenge(s) to the elements of discipline being live, the employee may not suffer as if those elements were actually part of the employee's record. Although the employee has been issued the disciplines, the propriety of the actions has not been determined. Our Collective Bargaining Agreement does provide for deferment of the validity determination until adjudication. Because of that deferment, management's reliance on unadjudicated discipline creates a due process argument in the grievant's favor that a record unadjudicated cannot be held against an employee in subsequent disciplines.

# THE COLLECTIVE BARGAINING AGREEMENT

While there is no specific language in the Collective Bargaining Agreement prohibiting management from including past elements not yet adjudicated in the Grievance/ Arbitration procedure, there is language regarding management's responsibility to investigate prior to issuing discipline. Steward investigations often will reveal the issuing manager has no clue as to whether elements of past record cited have or have not been adjudicated. When this occurs, the adjudication argument spills over into the lack of investigation argument.

The following Collective Bargaining Agreement provisions should prove useful when arguing lack of adjudication and consideration of those past elements:

**ARTICLE 19's EL-921, - "Supervisor's Guide to Handling Grievances"**

**"E. Investigation**

As previously discussed, when an employee commits an offense which seems to warrant discipline, the supervisor must avoid rushing into a disciplinary action without first investigating. The need for an investigation to meet our just cause and proof requirements is self-evident. However, the employee's past record must also be checked before any disciplinary action is considered. This is obviously necessary if we are to abide by the principle of progressive discipline.

**F. How Much Discipline**

Items for consideration in assessing discipline include but are not limited to:

The past record of the employee; and/or other efforts to correct the employee's misconduct."

## THE INTERVIEW

The Local Union's grievance records will tell the steward what elements of discipline have not yet been adjudicated. Questions concerning the past record will assist more in the areas of failure to investigate, lack of firsthand knowledge, and involvement in issuance of the discipline.

Some examples are:

- You checked the employee's past record prior to issuing this discipline?
- Were all these past elements adjudicated?
- Were any of these past elements adjudicated?
- What was the final disposition of the (date) letter of warning? 7-day suspension? 14-Day suspension?
- You don't know what the final disposition will be for the suspension dated _____?
- You included a past record of discipline which you are not sure will exist when this removal is heard in arbitration?
- You were aware when you included these past elements that they had not been adjudicated?

Again, interview questions will greatly assist in determining the true involvement of the issuing supervisor.

## THE ARBITRATORS

Arbitral reference supports our position on consideration and reliance of elements of discipline not adjudicated:

***Arbitrator Bernard Cushman*** ***Case No. E7C-2A-D 36112***
***Philadelphia, PA*** ***September 6, 1991*** ***Pages 12-13***

> "Those absences are serious matters and might very well have warranted removal as the terminal stage of progressive discipline for the Grievant's overall attendance failures. However, the matter of prior disciplinary actions is incomplete since the two suspensions are still in the grievance/arbitration procedure. It is clear from the testimony of Golden and the Notice of Proposed Removal and Decision letters that the decision to remove the Grievant was not based upon this absence alone but upon those absences in conjunction with the Grievant's past record including the two suspensions still in the grievance arbitration procedure. The outcome of that procedure is not known. There-

fore, the removal action was premature. If the Grievant prevails in the grievance arbitration procedure, the progressive disciplinary foundation for his removal would not exist. As Arbitrator Cohen stated in Case No. C4C-4F-D 7801 in a similar situation:

> In view of the fact that the conduct which triggered Grievant's discharge has never been determined to be improper, I have no choice but to sustain Grievant's instant grievance.

Likewise, the Arbitrator is of the view that in this case he has no choice except to sustain the grievance."

***Arbitrator Dennis R. Nolan*** ***Case No. S4N-3A-D 37169***
***Dallas, TX*** ***March 6, 1987*** ***Pages 6-7***

"Were this a case of first impression I would not adopt such a rule. While Arbitrator Williams is correct that disciplines may be eliminated or modified on appeal and thus provide a shaky basis for the most recent penalty, prohibiting reliance on appealed disciplines creates other, potentially more common problems. Consider the case of an employee who commits a series of offenses which under a system of progressive discipline would merit, in turn, warning, suspension, and removal. Final resolution of appeals takes many months. That means that if the employee's offenses are reasonably close together, no one of them could be relied upon to support a higher level of discipline in the next instance. The initial warning, for example, could not be used to justify a suspension on the second offense. In theory, and except for extreme offenses which would justify major discipline without following the progressive steps, Management could not suspend the employee until at least one discipline had been finally upheld in arbitration. A far more reasonable rule would allow Management to rely on grieved disciplines -- but at its peril. If one of the earlier disciplines was modified or revoked on appeal, then the later level of discipline would become questionable. Such a system would work even better if the parties routinely consolidated all pending disciplinary grievances in one arbitration hearing.

This is not a case of first impression, of course. With ten years of arbitral authority holding that Management may not rely on grieved disciplines, no regional arbitrator should adopt a contrary position. Change must come, if at all, in negotiations or at national arbitration. I must therefore conclude that discharge was far too severe a penalty for these offenses, even if Management proved her guilty of them."

"Based on Tucker's report of the incident and a previous disciplinary action still under appeal at the time, the Postal Service chose to discharge the Grievant.

The Union is correct when it contends that the Postal Service improperly relied on a disciplinary action that was scheduled to be heard in Arbitration. Until that appeal is finally adjudicated, it has no standing in this proceeding."

***Arbitrator Linda DiLeone Klein*** ***Case No. E7T-2B-D 28220***
***Southeastern, PA*** ***April 8, 1991*** ***Pages 6-7***

"The Arbitrator must, however, take into account the fact that the fourteen day suspension and one AWOL charge are awaiting resolution in the grievance-arbitration procedure. The Union offered several arbitration decisions to support its position that the Arbitrator "cannot consider discipline which is being adjudicated..." for the reason that any reduction or elimination of penalty "has a definite impact on the past record, progressive discipline, etc. ..."

The issue then becomes whether or not the absences cited in the charges, together with a letter of warning and a three day suspension warrant the severest penalty."

## CHAPTER 14

# THE ISSUE: MODIFIED PAST ELEMENTS OF DISCIPLINE MUST BE CITED IN MODIFIED STATE IN SUBSEQUENT DISCIPLINE

# THE DEFINITION

The citation of modified disciplinary actions in their original form as elements of past record relied upon and included in subsequent discipline.

# THE ARGUMENT

Management often cites past disciplinary actions as elements of record which were considered in taking a subsequent disciplinary action. In doing so, management cites a fourteen day suspension even though that fourteen day suspension was reduced to seven days previously. Another example would be management citing a "fourteen day suspension reduced to seven days" thereby including the modification of seven days and the original fourteen day.

A National Level Step 4 interpretive decision requires only management's inclusion of the modified discipline, not the original discipline. Inclusion of both or of only the original is a violation of the parties' mutual agreement in the Step 4 decision. Further, inclusion of the full discipline demonstrates punitive intent rather than a corrective attempt because management is attempting to booster justification for its action through inclusion of more severe discipline when it does not exist. Should management claim it was unaware of the modification, then management admits it failed to conduct a thorough, objective, and fair investigation before initiating and issuing discipline. Based upon the Step 4, it must also be argued the disciplinary notice is fatally and procedurally defective and in violation of the Step 4.

# THE COLLECTIVE BARGAINING AGREEMENT

Article 15 provides for interpretation of our Collective Bargaining Agreement by the parties.

**ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE**

**"Section 2** Grievance Procedure Steps
**Step 3**:
**(e)** If either party's representative maintains that the grievance involves an interpretive issue under the National Agreement, or some supplement thereto which may be of general application, the Union representative shall be entitled to appeal an adverse decision to Step 4 (National level) of the grievance procedure.

**Step 4**:

**(a)** In any case properly appealed to this Step the parties shall meet at the National level promptly, but in no event later than thirty (30) days after filing such appeal in an attempt to resolve the grievance. ... The decision shall include an adequate explanation of the reasons therefor."

**The National Level Step 4 Interpretive Decision for Case No. H7C-NA-C 21** dated August 17, 1988, states:

"This is in response to the issues you raised in your letter of December 18, 1987, and Step 4 grievance (H7C-NA-C 21, dated June 29, 1988) concerning the maintenance of employee disciplinary records, as well as the Step 4 grievance (H4C-5R-C 43882) challenging the management practice of including in past element listings of disciplinary actions the original action issued and the final action resulting from modification of the original action.

In full and final settlement of all disputes on these issues it is agreed that:

3. In the past element listings in disciplinary actions, only the final action resulting from a modified disciplinary action will be included, except when modification is the result of a "last chance" settlement, or if discipline is to be reduced to a lesser penalty after an intervening period of time and/or certain conditions are met."

**JOINT CONTRACT INTERPRETATION MANUAL – ARTICLE 16.10**

**PAST ELEMENTS**

In the past element listings in disciplinary actions, only the final action resulting from a modified disciplinary action will be included, except when modification is the result of a "last chance" settlement, or if discipline is to be reduced to a lesser penalty after an intervening period of time and/or certain conditions are met.

# THE INTERVIEW

Like the interview for "past elements not adjudicated", the interview here will reveal intent, involvement, and investigation on the part of the supervisor:

- You included this discipline record in the Notice of Removal?
- Prior to initiating and issuing this removal, did you check Mr. Doe's past discipline record?
- Did you know Mr. Doe's fourteen day suspension had been reduced to seven days?
- You included it anyway? Why?
- When you checked Mr. Doe's past discipline record, how did you check it?

- With whom did you check?
- You considered the fourteen day suspension, is that correct?
- If you did not consider the fourteen day suspension, why did you include it?
- You relied on past elements in this Notice of Removal which were modified after their original issuance?
- You knew about the modification and still cited the original discipline?

Questions like these can be revealing and may trap the supervisor into responses which uncover lack of investigation, minimal involvement and/or punitive intent.

# THE ARBITRATORS

Arbitral authority is limited on this issue. The following decisions include reference by the Arbitrators of the violation:

***Arbitrator Michael E Zobrak*** ***Case No. E7C-2B-D 44692***
***Bellmawr, NJ*** ***April 8, 1991*** ***Page 12***

"As to the matters involving the listing of the past elements considered when determining to remove the Grievant, the Union is correct in citing the fact that the Grievant's prior suspensions had been reduced to 1 and 4 days. Furthermore, an August 17, 1988, Step 4 Settlement provides that only the final action resulting from a modified disciplinary action is to be listed as an element to be considered. The Step 2 Settlement of May, 1990, was not a last chance agreement, nor were the reductions in the 1- or 4-day suspensions based on an intervening period of time and/or certain conditions being met. Mention of the 7-day and 14-day suspensions as elements of the past record were improperly listed on the Notice of Proposed Removal.
Based on all of the foregoing, it is determined that the Grievant was improperly removed due to the procedural defects cited by the Union."

***Arbitrator Frances Asher Penn*** ***Case No. J98C-1J-D 02016548***
***Chicago, IL*** ***January 24, 2003*** ***Pages 3, 4 & 5***

"Based on the evidence in the record, the arbitrator finds that the incorrect inclusion of The May Notice of Removal may well have prejudiced the decision by Management to remove the grievant. The May Notice of Removal has been reduced to a fourteen-day suspension and the fact that the previous Notice of Removal was issued should not have been mentioned again.

The arbitrator finds the inclusion of the May notice in the record of past discipline was a very serious mistake. For one thing it violated a clearly stated policy promulgated by the Postal Service and agreed to by the Union. The policy is set forth in a letter, dated August 17, 1988, and signed by William Burrus, Executive Vice President of the American Postal Workers Union and Stephen W. Furgeson, General Manager, Grievance and Arbitration Division of the Postal Service. The letter states that when a disciplinary action is reduced in a settlement, only the final action is to be referred to from then on. "In the past element listings in disciplinary actions, only the final action resulting from a modified disciplinary action will be included except when modification is the result of a "last change" settlement, or if discipline is to be reduced to a lesser penalty after an intervening period of time and/or certain conditions are met."

Not only did the mistake violate policy but also it may have had severe consequences for the grievant. Listing the first Notice in record of discipline, made the grievant's record look worse than it was, and this could well have weighted the decision to remove her against her.

The arbitrator has seriously considered the position of the Postal Service that even without the May Notice, the grievant was subject to removal because she had already received a fourteen-day suspension for Failure to Maintain Regular Attendance so that removal was the next disciplinary step. But the fact that the Postal Service *could* have removed the grievant does not prove that they *would* have removed her at this particular time. For instance, she might have been offered a last chance agreement. Of course what anyone would have done cannot be determined after the fact.

Based the particular facts, the arbitrator concludes that the inclusion of information that violated a properly agreed to settlement was sufficiently serious to require that the grievant be returned to employment with the Postal Service. This result is in keeping with the decisions of several other arbitrators in other Postal Service cases. In Case Nos. S1N-3K-D 11541 and 11542 (1983), Arbitrator Patrick Harden wrote:

*As historians are fond of pointing out, it is difficult enough to know what happened – what might have happened if things had been different is always a matter of conjecture. What <u>did</u> happen in this case is that management acted on a record of discipline in violation of its promise not to do so. What would have happened otherwise can, of course, be estimated with care, but ultimately only estimated.*

*In this case, it seems clear, there is some risk that Mr. Ward has been disadvantaged by the improper consideration of an item of his past record. That risk, in turn, involves a threat to the integrity of the grievance resolution process. Both labor and management must have confidence that voluntary grievance resolutions will be respected and complied with. The violation of a settlement term, even when in all good faith, must be closely examined and very carefully justified. Otherwise, the parties will be inhibited in the settlement of their disputes. For all of these reasons I conclude that Postal Service management has not proved that Mr. Harris' consideration of the grievant's 1981 letter of warning was a harmless error.*

See also: Case No. S4C-3E-D 34509 (Britton, 1986); Case No. C0C-4A-D 15774 (Klein, 1993); J90C-1J-D 94013794 (Klein, 1994); Case No. E7C-2B-D 44692 (Zobrak, 1991).

Thus, the arbitrator concludes that the grievant was disadvantaged by the improper listing of the information in the record of past discipline. Therefore, the grievant will be reinstated to employment with the Postal Service."

***Arbitrator Linda DiLeone Klein*** ***Case No. J90C-1J-D 94013794***
***Carol Stream, IL*** ***August 9, 1994*** ***Pages 7-8***

OPINION

"Prior to discussing the merits of this case, the Arbitrator must first address the procedural argument raised by the Union. The current Notice of Removal contains a reference to the prior Notice of Removal which was reduced to a fourteen day suspension. The Arbitrator is of the opinion that it was improper to include any reference to the prior removal in the current discipline; as a result, Managers who reviewed the action and Managers who had the authority to concur therewith or resolve the subsequent grievance were given the opportunity to consider the original discipline as well as the reduced discipline.

The parties are governed by the above-quoted settlement entered into on November 27, 1992, and the inclusion of reference to the prior removal in the current letter of charges was contrary to the clear language of their agreement. If the settlement process is to have force and effect, the parties must abide by the express terms of their agreement. Reference to the prior removal in the current discipline is also contrary to the Step 4 settlement in Case Nos: H7C-NA-C-21 and H4C-5R-C 43882.

The grievant was prejudiced and disadvantaged by the inclusion of the phrase "reduced from removal" in the elements of past record on the current discipline. This procedural error constitutes the basis for modification of the current penalty."

***Arbitrator Christopher E. Miles*** ***Case Nos. E0C-2A-D 7000, 6999***
***Philadelphia, PA*** ***September 7, 1993*** ***Page16***

"In addition, the Union has raised an issue concerning a past element cited in the grievant's Notice of Removal. In this regard, documentation was introduced which established that the Union did not agree with the Postal Service's unilateral action to reduce a prior removal to a suspension of time served and the matter was appealed to arbitration and has yet to be resolved. Based upon a Step 4 Decision signed by the parties, dated August 17, 1988, it was agreed that "In the past element listings in disciplinary actions, only the final action resulting from a modified disciplinary action will be included, except when modification is the result of a "Last Chance" Settlement, or if the discipline is to be reduced to a lesser penalty after an interceding period of time and/or certain conditions are met." In this instance, the prior removal action was modi-

fied to a time served suspension by the Postal Service, however, such was not signed off on by the Union. Therefore, it cannot be considered as a final action since the matter remains pending. Moreover, when questioned about this scenario, Ms. Floyd conceded that such should not have been listed as a past element in the grievant's record and she also testified that if she was aware that the prior disciplinary action was still pending, she would not have concurred in the removal of the grievant in this instance."

## CHAPTER 15

# THE ISSUE: PLACEMENT IN OFF-DUTY STATUS OUTSIDE REASONS IN ARTICLE 16.7

# THE DEFINITION

Whenever management places an employee in Off-Duty Status utilizing the Emergency Procedure of Article 16.7 for a reason other than those specifically negotiated into Article 16.7 by the parties.

# THE ARGUMENT

Management cannot, in accordance with Article 16.7 of the Collective Bargaining Agreement, properly place an employee on emergency off-duty status if such placement is for a reason other than one of those specifically included in Article 16.7. Examples of improper reasons for Emergency Placement in Off-Duty Status would be insubordination, conduct unbecoming an employee, failure to follow instructions, no work performed or violation of USPS standards of conduct.

Any reason for Emergency Placement in Off-Duty Status outside the six stated reasons included in Article 16.7 is a violation of the Collective Bargaining Agreement.

# THE COLLECTIVE BARGAINING AGREEMENT

**ARTICLE 16 DISCIPLINE PROCEDURE**

**"Section 7. Emergency Procedure**

An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance."

**JOINT CONTRACT INTERPRETATION MANUAL – ARTICLE 16.7**

***EMERGENCY PLACEMENT***

**WRITTEN NOTICE – EMERGENCY PLACEMENT**

However, the employee is entitled to written notice stating the reasons for such placement within a reasonable time frame.

# THE INTERVIEW

Clear establishment of the reasons for Emergency Placement in Off-Duty Status should come from the required written notice soon after the Emergency Placement. However, in instances in which the reasons included in the notice are not clear, the interview becomes the necessary tool to establish the crucial point that Emergency Placement was not imposed for an Article 16.7 reason:

- You placed Mr. Doe in off-duty status for insubordination?
- He refused to report to the window area?
- He refused your direct order?
- He threatened you?
- What did he say?
- Who else was present?
- He did not threaten you?
- Mr. Doe refused to perform any work?
- You placed him off-the-clock for that reason? For other reasons?

It is important to close the door on management efforts to revise their reasons for Emergency Placement in Off-Duty Status which will occur at arbitration. If “Insubordination" is the stated reason in writing for the Emergency Placement in Off-Duty Status a management advocate will attempt to expand on that term to include "threat", "dangerous to self or others" or some reason under 16.7. Insubordination, in particular, can have varied slants in its meaning.

# THE ARBITRATORS

The following excerpts clearly set forth the 16.7 inclusion principle:

***Arbitrator Barbara Zausner Tener*** ***Case No. N7C-1N-D 20350***
***Paterson, NJ*** ***February 14, 1990*** ***Pages 2-3***

"Article 16, Section 7. "Emergency Procedure" provides for immediate placement in off-duty status for a variety of named offenses none of which applies here. Emergency action may also be taken "in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others".

The events which triggered the emergency suspension are described in the record. Supervisor Angevine testified that the grievant was spending too much time allegedly pursuing his duties as a union steward and that the grievant refused to obey an order to report to the 030 operation. Even if all of the testimony is credited, the charges and the circumstances do not fall within the ambit of Article 16.7.

There is no evidence that there was any threat to USPS property or that mail or funds could have been lost. If the grievant misbehaved or was insubordinate he should have been issued some disciplinary penalty. There is no evidence that the personal safety of the grievant or his coworkers was in jeopardy. Article 16.7 is reserved for specific and limited purposes. It cannot be used unless the conditions set forth therein are met. For that reason, the grievance must be sustained."

***Arbitrator Lawrence R. Loeb*** ***Case No. C90C-1C-D 94058330***
***Pittsburgh, PA*** ***May 31, 1995*** ***Pages 13-16***

"The remaining two grievances are on point because they both involve emergency suspensions of employees who were insubordinate for refusing to follow orders. In considering the matter, Arbitrators Robert J. Ables in Case No. E4C-2F-D 10471, and Barbara Zausner Tener in Case No. N7C-1N-D 20350 both concluded that insubordination in and of itself does not fall within the scope of Article 16.7. In essence, their position amounts to reaffirmation of the old principle that to include one thing is to exclude all others. In practical terms, it means that since the parties agreed that the Service could place an employee on emergency off-duty status if there was an allegation of intoxication by either drugs or alcohol, pilferage or failure to observe safety rules or regulations or where retaining the employee may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to himself or others, they limited Management's right to use that remedy to
those specific situations only. Everything which falls outside the parameters of those categories cannot and does not afford Management a basis for placing an employee on emergency off-duty status."

"3. The Emergency Suspension

The next issue is whether the emergency suspension was for just cause. The stated reason on the June 12 written notice to the Grievant placing her in that off-duty non pay status was "your retention may result in loss of U.S. Mail. Preliminary investigation indicates that you were involved in failure to account for funds." This was never a case involving the loss of the mail, and Article 16, Section 7 does not authorize an emergency suspension for a "failure to account for funds". Paluszek testified her concern was to avoid retaining the Grievant on duty in the building where she might have access to Postal funds. However, that is at odds with the Postal Service's position that the Grievant did not follow applicable regulations and was otherwise irresponsible in maintaining her accountability as based upon what was found in the audit. The Postal Service's position is not that the Grievant stole the missing funds in question. Nor is there any evidence in the record that she was a threat to the safety of other Postal funds. Under these circumstances, the Grievant could have performed distribution work while the audit was further investigated. For all these reasons, the emergency suspension was not for just cause."

***Arbitrator Nicholas H. Zumas*** ***Case No. B90C-1B-D 95037817***
***North Reading, MA*** ***January 9, 1996*** ***Pages 7-8***

"It does not appear that falsification of medical documentation (admitted by the Grievant in this case) falls within any of the criteria set forth in Article 16.7. The Union is correct when it asserts that, under these circumstances, Grievant could have been allowed to remain in a work status while the matter was investigated and a decision reached as to what Management considered to be the appropriate level of discipline to be imposed. As such, she is entitled to be compensated for the period of the emergency placement, namely August 10, 1994 through October 22, 1994, the effective date of the removal."

## CHAPTER 16

# THE ISSUE

**PLACEMENT IN OFF-DUTY STATUS WITHOUT POST PLACEMENT WRITTEN NOTIFICATION**

# THE DEFINITION

Whenever management places an employee on off-duty status under Article 16.7, management is required to notify the employee in writing of the reasons and date of said placement within a reasonable period of time following the Emergency Placement in Off-Duty Status.

# THE ARGUMENT

Arbitrator Mittenthal in a National Level arbitration case set forth the principle that management is required to issue a written notification to an employee following an Emergency Placement in Off-Duty Status stating the reasons for the placement. Without this mandatory, written notice, management's placement is procedurally defective in that the emergency placement does not comply with Arbitrator Mittenthal's National Level award and since there is no written reason, a required reason as set forth in 16.7 cannot exist.

# THE COLLECTIVE BARGAINING AGREEMENT

**ARTICLE 16 DISCIPLINE PROCEDURE**

**"Section 7. Emergency Procedure**

An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance."

The National Arbitration decision states:

***Arbitrator Richard Mittenthal Case No. H4N-3U-C 58637 & H4N-3A-C 59518***
***Dallas, TX August 3, 1990 Pages 11-12***

"These findings, however, do not fully resolve the dispute. The fact that no "advance written notice" is required does not mean that Management has no notice obligation whatever. The employee suspended pursuant to Section 7 has a right to grieve his suspension. He cannot effectively grieve unless he is formally made aware of the charge against him, the reason why Management has invoked Section 7. He surely is entitled to such notice within a reasonable period of time following the date of his displacement. To deny him such notice is to deny him his right under the grievance procedure to mount a credible challenge against Management's action. Indeed, Section 7 speaks of the employee remaining on non-duty, non-pay status "until disposition of the case has been had." That "disposition" could hardly be possible without formal notice to the employee so that he has an opportunity to tell Management his side of the story. Fundamental fairness requires no less."

**JCIM – ARTICLE 16.7**

**EMERGENCY PLACEMENT**

**WRITTEN NOTICE – EMERGENCY PLACEMENT**

Management is not required to provide advance written notice prior to placing an employee in an off-duty status under Article 16.7. However, the employee is entitled to written notice stating the reasons for such placement within a reasonable time frame.

# THE INTERVIEW

In this circumstance, our interview simply solidifies the violation of the National Award:

- You placed Mr. Doe off the clock on (date)?
- You did not send him a written notification of your reasons for this Emergency Placement in Off-Duty Status?
- Aren't you required to send him such a notice?
- You waited one week to send him the written notice? Two weeks?

"It is difficult to conclude that while the employee has the right to file a grievance under Article 16, Section 7, the Employer does not have an obligation to put into writing under what circumstances the employee was charged or provide the reasons for why it took the disciplinary action it did. The parties who bargained Article 16, Section 7, could not have intended such a result without so stating it in clear language.

I subscribe fully to the reasoning and conclusions of Arbitrator Mittenthal. It is absolutely appropriate that employees placed off-duty without pay under Article 16, Section 7, be presented with a written notice explaining the Postal Service's actions as soon as it is reasonably possible to do so.

The Postal Service argued in this instance that its failure to issue a written notice, if found to be in violation of the Agreement should also be found to be a deminimis violation and a harmless error. The reasoning applied here is strained. For an employee to mount a defense in a disciplinary grievance of any kind, it is essential that the facts of the charges be as detailed and specific as possible. An oral explanation can lead to misunderstanding and cannot be deemed sufficient."

## CHAPTER 17

# THE ISSUE: PLACEMENT IN OFF-DUTY STATUS AFTER TIME LAPSE BETWEEN INCIDENT AND ACTUAL PLACEMENT

# THE DEFINITION

Whenever management invokes the Article 16.7 emergency procedure for Emergency Placement in Off-Duty Status, that placement, by definition, is to occur immediately--without delay.

# THE ARGUMENT

Again, it was Arbitrator Mittenthal in a National Level award that defined the Article 16.7 Emergency Placement in Off-Duty Status as an immediate action which would occur without hesitation or delay. The usual purpose of the Emergency Procedure was for immediate diffusion of a possibly volatile situation--as an emergency. Management, on the other hand, often misapplies the emergency procedure. An example would be:

> Supervisor Jones witnesses a heated verbal altercation between two employees at 7:30 a.m.. Jones then orders employee Smith to work in the box mail section and employee Doe to work distributing parcels. The two work stations are approximately 70 feet apart and separated by Letter Carrier cases. He further instructs the two employees to have no contact with one another. At 11 a.m. the Postmaster reports for duty at which time Supervisor Jones relates what occurred at 7:30 a.m.. After consultation, either the Postmaster or Supervisor places both employees off the clock through "utilization" of Article 16.7.

This is a procedurally defective Emergency Placement in Off-Duty Status. The immediate dismissal intent of Article 16.7 is not in existence at 11:00 or 11:15 a.m.. The Supervisor must have utilized 16.7 at the time the altercation occurred; not hours later.

Once a reasonable time period has elapsed, say more than ten or fifteen minutes (although a shorter period could be argued), the suspension of employee(s) cannot properly fall under Article 16.7. Since other suspensions of, for example, seven or fourteen days must occur after ten day notification, any "emergency" suspension would be procedurally defective and in violation of Article 16 of the Collective Bargaining Agreement.

# THE COLLECTIVE BARGAINING AGREEMENT

The definition of an emergency found in Article 3 of the Collective Bargaining Agreement supports our position that 16.7 cannot be properly imposed after a delay.

**Article 3 MANAGEMENT RIGHTS**

> **". . . F. Emergency Situations** ... i.e., an unforeseen circumstance or a combination of circumstances which calls for **immediate action** in a situation which is not expected to be of a recurring nature." (Emphasis and underscoring added.)

**ARTICLE 16 DISCIPLINE PROCEDURE**

**"Section 7. Emergency Procedure**

> An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance."

In addition to the above referenced language, there is the defining National Level decision of Arbitrator Mittenthal in Case No. H4N-3U-C 58637 & H4N-3A-C 59518:

***Arbitrator Richard Mittenthal*** ***Case No. H4N-3U-C 58637 & H4N-3A-C 59518***
***Dallas, TX*** ***August 3, 1990*** ***Pages 10-11***

> "When the "emergency procedure" in Section 7 is properly invoked, the employee is "immediately" placed on non-duty, non-pay status. He does not have a right to remain, for any period of time, "on the job or on the clock at the option of the Employer." He suffers an instant loss of pay.
>
> ... The critical factor, in my opinion, is that Management was given the right to place an employee "immediately" on non-duty, non-pay status on the basis of certain happenings. An "immediate..." action is one that occurs instantly, without any lapse of time. Nothing intervenes between the decision to act and the act itself. That is what the term "immediately" suggests."

**JOINT CONTRACT INTERPRETATION MANUAL – ARTICLE 16.7**

**Section 7. Emergency Procedure**

An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance.

# THE INTERVIEW

Developing the reasoning behind delays in an Emergency Placement in Off- Duty Status will protect the Union and grievant against management conjured reasoning at a later time. Although time records will reflect when an employee was actually placed off duty, the time frame of the decision is crucial because slight delays such as trips to the lavatory, locker room, etc., may be used as management excuses for lack of immediacy. The interview is our excellent tool to nail down the facts:

- What time did the incident occur?
- Were you present during the incident?
- Did you witness the incident?
- Did you instruct the employees to separate work areas following the incident?
- You did not send them home when the incident occurred?
- How long after the incident did you send them home?
- What other information did you obtain between the time of the incident and the Emergency Placement in Off-Duty Status which affected your decision?
- What subsequent incident occurred after the first incident which affected your decision to place them in Emergency Off-Duty Status?
- At what time did you make the decision to place them in Emergency Off-Duty Status?
- Did the Postmaster tell you they should be placed in Emergency Off-Duty Status?
- Did the Postmaster agree that they should be placed in Emergency Off-Duty Status?

- Since you did not witness the incident, did you speak to each employee before the Emergency Placement in Off-Duty Status?

- Why didn't you immediately place them in Emergency Off-Duty Status?

Determining the reasoning and time frames for the incident, the delay and the decision will prove the difference between a successful due process argument and a failed one when the Emergency Placement in Off-Duty Status is not immediate.

## THE ARBITRATORS

Since most Emergency Placements are imposed with little, if any, delay, arbitral support is not extensive. Here is one decision:

***Arbitrator George R. Shea, Jr.*** ***Case No. N7V-1W-D 14106***
***Syracuse, NY*** ***August 10, 1989*** ***Page 7***

"Finally, the arbitrator notes that the parties' Agreement provides that the Service may "immediately place an employee on an off duty status where the employee may be injurious to self or others. Correspondingly the arbitrator notes that the record of this case does not indicate that the Service exercised this contractually sanctioned option.

Based on his review of the record, the arbitrator finds that the Service has not established that the grievant's remarks constituted a threat to the Supervisor. The Service failed to establish that the grievant's remarks constituted a threat by his use of clear language denoting an intent to harm DeRose, or by his use of threatening or ominous gestures concurrently with his remarks, or by circumstantial evidence supporting a menacing interpretation of the grievant's statement not readily communicated by the words themselves. In addition, the arbitrator notes that the Service did not emergent suspend or otherwise remove the grievant from duty for any appreciable length of time until fourteen days after the incident in which it alleged the grievant posed a serious threat to the Supervisor's safety. Finally, the arbitrator notes that the grievant did offer a plausible and legitimate interpretation of his remarks to the Supervisor."

## CHAPTER 18

# THE ISSUE: <u>30-DAY ADVANCE NOTICE FOR REMOVAL</u>.

# THE DEFINITION

The Collective Bargaining Agreement requires management to provide advance written notice of charges in removal instances and 30 days either on the job or on the clock prior to the removal taking effect. (In cases in which the employer has reasonable cause to believe guilt for a crime the full 30 day notice is not required.)

# THE ARGUMENT

Often management fails to provide the required 30 days notice. As an example, management issues an employee a Notice of Removal for Failure to Meet the Attendance requirements of the position or for "Insubordination". In the Notice issued on May 1, management states the employee will be removed on May 29. Management has failed to provide the required 30 day advance notice with 30 days either on the job or on the clock. Management has violated Article 16.5 of the Collective Bargaining Agreement and issued a procedurally defective and violative Notice of Removal.

There are also instances in which the employee <u>is</u> given the 30 days advance notice but the employee is neither kept on the job nor paid for the required 30 day period. This is also violative of Article 16.5 and the due process rights entitled under the Collective Bargaining Agreement. Often the USPS misapplies Article 16.7's Emergency Procedure and "<u>continues</u>" an Emergency Suspension <u>into the Article 16.5 Notice period</u>. This is in violation of Article 16.5 and the 30 day Notice requirement. When an employee is issued a Notice of Removal, any Emergency Suspension ends and the required 30 day Notice period begins.

# THE COLLECTIVE BARGAINING AGREEMENT

**ARTICLE 16 DISCIPLINE PROCEDURE**

**"Section 5** Suspensions of More Than 14 Days or Discharge

In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the Employer is not required to give the employee the full thirty (30) days advance written notice in a discharge action, but shall give such lesser number of days advance written notice as under the circumstances

is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period."

There is also a **National Level Step 4 Interpretive Decision** which clarifies when the 30 days notice requirement commences. The decision for **Case No. H4N-4A-D 30730** states:

> "The issue in this grievance is whether the day of receipt of a notice of discipline should be included as part of the required minimum period of notice to the employee.
>
> We further agreed that for purposes of computing the period of notice required in advance of the imposition of various disciplinary measures, such notice period shall be deemed to commence on the day following the date upon which the letter of notification is received by the employee."

# THE INTERVIEW

Since the date of the Removal's issuance and its effective date will most likely not be in dispute, the interview again will focus most on the supervisor's involvement, role and knowledge of the removal provisions for which he is responsible. In the event there is a dispute as to the date of issuance, our questions should resolve same. Some examples are as follows:

- The removal is dated May 1--did you issue it on May 1?
- If not, on what day did the grievant receive the Notice of Removal?
- Do you have proof of receipt by the grievant?
- Following the grievant's receipt he was not kept either on the job or on the clock for 30 days? Why?
- Are you aware of the 30 day requirement?
- Did you include this effective date in the removal?
- Who did?
- Did you check the removal after you received it from the Postmaster? Labor Relations?
- The MDO? The Plant Manager?
- If this removal had been your decision you would have made sure the 30 day rule was properly followed?

- Who was responsible for not providing the 30 day notice?

As with all interviews provided in this Handbook, the steward's orchestration is the key to eliciting the most favorable responses.

## THE ARBITRATORS

Arbitral support on this due process issue is mixed. We have had Arbitrators overturn removals with full back pay while others upheld removals while paying employees for the 30 day period. In any event, our pursuit of the argument and violation must be without exception.

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| ***Arbitrator Gerald Cohen*** | | ***Case No. C4V-4E-D 8648*** |
| ***Canton, OH*** | ***April 2, 1986*** | ***Pages 11-13*** |

"However, the Union has made another argument that cannot be ignored. The Union claims that the National Agreement was violated in that Grievant did not get his thirty days of advance notice for removal. Article 16 (Discipline Procedure), Section 5 (Suspension of More Than 14 Days or Discharge) provides:

"In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided there, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. ..."

This shows that an employee is entitled as a negotiated right to receive thirty days' notice of discharge. Clearly, Grievant here did not receive such notice. That is found in two documents: 1) The Notice of Proposed Removal, which was dated August 23, and states:

"This is advance written notice that it is proposed to remove you from the Postal Service no sooner than 30 days from the date of your receipt of this letter."

The date of Grievant's signature, showing his receipt of this Notice, was August 26, 1985. That date was not disputed.

The next document in question is dated September 19, 1985, and is entitled, "Letter of Decision - Removal", in which the Postal Service reaffirmed Grievant's removal and stated that the removal would be effective Tuesday, September 24.

Grievant received this letter, according to this signature and date, on September 20, 1985. Therefore, the conclusion is clear that Grievant received a removal on August 26, to be effective on September 24. That is a period of twenty-nine days.

The argument might be made that the one day is insignificant. However, for me to ignore the one day would be for me to re-write the contract. Arbitrators are not entitled to do so. They must accept the lines drawn by the parties and adhere to them. In this in-

stance, a line was drawn at thirty days. Failure of the Postal Service to adhere to this renders the discharge procedurally defective."

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|---|---|---|
| ***Arbitrator Gerald Cohen*** | | ***Case No. C1C-4J-D 142*** |
| ***Oshkosh, WI*** | ***June 30, 1982*** | ***Pages 8, 9-12*** |

"Grievant admittedly did not receive his 30-day advance notice of termination. This clearly and explicitly constitutes a violation of the National Agreement. Any discharge resulting from such a violation cannot be considered for just cause, regardless of the merits of the discharge.

The grievance is sustained. Grievant is to be reinstated with back pay, less credit to the Postal Service for any receipts, wages or other earnings earned by Grievant after his discharge and prior to his reinstatement. The Arbitrator will retain jurisdiction to compute back pay, should the need arise."

| | | |
|---|---|---|
| ***Arbitrator Frances Asher Penn*** | | ***Case No. C7C-4M-D 20972*** |
| ***Flint, MI*** | ***June 14, 1990*** | ***Pages 5-7*** |

"The arbitrator finds that the language of Article 16, Section 5 speaks for itself unambiguously. Section 5 states that in the case of discharge, "...any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days." The only exception stated is for situations where there is reasonable cause to believe that an employee is guilty of a crime, but this is not a consideration here. Section 5 sets forth a 30 day period before discharge can be effected in all other instances, and the arbitrator must uphold the Agreement as written by the parties. Other arbitrators have also upheld the notice requirement in the Agreement in prior awards including Case Nos. C7C-4M-D 16505 and C1C-4J-D 142.

The arbitrator concludes that the Postal Service violated the National Agreement by not providing the grievant with 30 days notice as specified in Article 16, Section 5. Because of this violation, the question of whether there was just cause for the discharge will not be considered, regardless of the merits.

AWARD

The grievance is sustained. The grievant is to be reinstated with back pay, less credit to the Postal Service for any receipts, wages, or other earnings earned by the grievant after her discharge and prior to her reinstatement. The arbitrator will retain jurisdiction to compute back pay, should the need arise."

"The Parties also have asked the Arbitrator to determine whether or not the Grievant's due process rights were violated when she failed to receive a second thirty-day notice. The Arbitrator concludes that her rights were violated, in this regard. A similar issue was raised in the case discussed above by Arbitrator Snow, where an employee allegedly violated a last chance agreement which accompanied the holding of a removal action in abeyance for 180 calendar days. There, where the Grievant was not accorded the full thirty days notice Arbitrator Snow ruled,

> ...(I)t cannot be said that the removal was merely a "reactivation" of the prior removal. The reasons used by the Employer for the removal in this case flowed from a violation of the Last Chance agreement, not from conduct prior to the Last Chance agreement. In other words, management based the removal in this case on new facts which were subject to "just cause" review, not on a determination of whether prior reasons for the grievant's removal constituted just cause. Article 16.5 of the parties' agreement contained a bargained for right to be enjoyed by the grievant, and it is not the role of an arbitrator to modify the bargain of the parties.

The Undersigned Arbitrator concludes that the same rationale applies in this case. Therefore, Article 16.5 was violated when the Service did not institute a new thirty-day notice period on September 25, 1992."

***Arbitrator Susan Berk*** ***Case No. C90C-4C-D 94011593***
***Media, PA*** ***September 19, 1994*** ***Page 19-20***

While there was no obligation on the Postal Service to advise the Grievant that her continued absences would result in her discharge, I concur with the Union that the Grievant should have been given 30 days notice of her removal. Article 16, Section 5, provides that employees who are discharged are entitled to thirty (30) days advance written notice "of the charges against him/her and shall remain on the job or on the clock at the option of the Employer for a period of thirty (30) days." Failure of the Postal Service to give the Grievant 30 days notice, therefore, violates Article 16, Section 5, of the National Agreement.

## CHAPTER 19

# THE ISSUE: STATEMENT OF BACK PAY MITIGATION INCLUDED IN NOTICES OF REMOVALS & NOTICES OF INDEFINITE SUSPENSIONS CRIME SITUATION

# THE DEFINITION

Whenever management issues a Notice of Removal or Notice of Indefinite Suspension-Crime Situation to an employee, that disciplinary letter must include a statement informing the employee that any back pay they may be entitled to is subject to scrutiny as to what efforts the employee made in seeking work.

# THE ARGUMENT

A National Level prearbitration agreement between the APWU and USPS requires each Notice of Removal and Notice of Indefinite Suspension-Crime situation to include the back pay notification. Should either disciplinary notice fail to include the notification, two arguments arise:

1. The disciplinary notice is fatally, procedurally defective and must be nulled.

2. Should the employee be granted back pay through a subsequent settlement or arbitration award, then that back pay is not subject to scrutiny as to whether the employee sought employment.

***Argument #1***

Many arbitrators may not hold that failure to include the mandatory notification renders a discharge or Indefinite Suspension-Crime Situation null and void. That does not diminish the Union's responsibility to raise and pursue the argument in our effort to provide the best possible defense and leave no argument undeveloped. Moreover, the failure by management to include the mandatory notification will only assist other Union arguments such as the degree of the supervisor's involvement and actual role in the issuance.

***Argument #2***

Should the arbitrator not be persuaded as to the null and void nature of the notice, the Arbitrator may very well be persuaded that failure to provide the mandatory notification directly affects the employee's back pay entitlements. Without notification, which is required, an employee cannot be held to the obligation to mitigate under Part 436 of the Employee and Labor Relations Manual. Had there been no agreement of the parties for notification, then the general rule of implied knowledge for each employee would apply. However, with the parties agreement on inclusion, the logical conclusion is no employee who is not informed may be held responsible for failure to mitigate.

# THE COLLECTIVE BARGAINING AGREEMENT

## EMPLOYEE AND LABOR RELATIONS MANUAL

"**436.22** Back pay is allowed, unless otherwise specified in the appropriate award or decision, provided the employee has made reasonable efforts to obtain other employment, except that the employee is not required to make such efforts during the first 45 days of the back pay period. This 45-day period does not apply to individuals who were denied employment with the Postal Service (see 436.428)."

In addition to the Employee and Labor Relations Manual, the aforementioned National Level resolution in Case No. **H4C-NA-C 82** states:

"3. Notice of the employee's duty and responsibility under Section 436 of the ELM to mitigate damages will be included in letters of removal and letters of indefinite suspension beginning July 15, 1989."

# THE INTERVIEW

To establish lack of knowledge and/or involvement of the issuing supervisor and the alleged higher level concurring official, we must normally conduct an interview.

However, due to the nature of this argument--the procedurally defective notice--management, if they are informed of the defect prior to Step 2, will probably rescind the
defective notice and reissue a corrected one. Once we make an appeal to Step 2 in writing and include the argument in that appeal, management is severely limited in its ability to correct the defect.

A detailed analysis of the principles behind management' limitation to rescind and reissue based upon information provided by the Union as part of a Step 2 appeal is found in arbitration Case No. **C90C-1C-D 94017643**. In that decision, Arbitrator Loeb addressed the issue of management reissuing a defective notice through its utilization of the Union's grievance appeal to Step 2 as the investigative engine. That decision is found under the Double Jeopardy/Res Judicata chapter of the Handbook.

In this particular due process issue, no interview should be done prior to the Step 2 appeal and since Step 2 is our "full disclosure" step, none would be provided for thereafter.

"Procedural Issues

The Union contended that the grievance should be sustained because there was a fatal flaw in the Notice of Removal in that the Notice of Removal did not contain a notice of the employee's duty and responsibility under Section 436 of the ELM to mitigate damages as required by a pre-arbitration settlement in Case H4C-NA-C 82. The settlement was entered into between the Union and the Postal Service at the National level and was signed by Anthony J. Vegliante, General Manager Programs and Policies Division, Office of Contract Administration of the Postal Service, and Thomas A. Neill, Director of Industrial Relations for the Union. It provided:

> Notice of the employee's duty and responsibility under Section 436 of the ELM to mitigate damages will be included in letters of removal and letters of indefinite suspension beginning July 15, 1989.

The settlement was dated April 27, 1989. The Grievant's letter of removal was dated May 29, 1989. The Union analogizes this situation to that involving cases concerning a Letter of Demand.

In a number of arbitration cases, arbitrators, including this arbitrator, have held that the notice of grievance rights provided for in Section 473.11 of the F-1 Handbook must be included in a Letter of Removal. This arbitrator, as well as a number of other arbitrators cited, held in those cases that notification of the appeal rights under the regulation is mandatory and that a Letter of Removal which fails to contain the exact verbiage found in the regulation is fatally defective.

The Postal Service contends that 1) the position urged by the Union in this arbitration proceeding was not raised during the grievance procedure and therefore may not properly be considered by the arbitrator, and 2) in fact, on June 12, 1990, only a few weeks after issuance of the May 29 letter, the Postal Service wrote a letter to the Grievant advising her of her obligation to make diligent efforts to secure outside employment in order to be eligible for back pay in the event her appeal should be sustained. The Arbitrator finds it unnecessary to address the question as to whether the contention might properly be raised in the arbitration proceeding in view of his determination concerning the merits of the Union's contention. In the view of the arbitrator, the Union presses the analogy to Letters of Demand too far. The inclusion of notice of a duty to seek employment even if the settlement be viewed on a par with a regulation of the ELM is quite a different matter from the notice of grievance appeal rights. First, the settlement agreement applies to Letters of Removal and Letters of

Indefinite Suspension. Realistically regarded, the so-called Letter of Removal in this case is not a disciplinary Letter of Removal, but rather relates to an administrative separation, and technically the settlement agreement does not cover the instant Letter of Separation. Second, the right to appeal through a grievance a Letter of Demand is a due process right which must be invoked within a 14 days time period. That right stands at the very threshold of the Letter of Demand appeal procedure. The obligation to seek other employment only becomes an operative factor if and when a grievance appeal is sustained. Thus, it refers to developments subsequent to the Letter of Removal and is anticipatory and contingent. A failure to file a grievance within the contractual 14 days time period is fatal. A failure to seek employment does not preclude reinstatement but only mitigates the amount of back pay if back pay is awarded. The Union's contention in this connection is without merit."

## CHAPTER 20

# THE ISSUE: **POSTAL INSPECTION SERVICE/OFFICE OF INSPECTOR GENERAL INTERFERENCE IN THE ARTICLE 15 AND/OR ARTICLE 16 DISPUTE RESOLUTION AND/OR DISCIPLINE PROCESSES.**

# THE DEFINITION:

The Postal Inspection Service and/or the Office of Inspector General attempts to influence Postal management within its issued Postal Inspection Service Investigative Memoranda or Office of Inspector General Report and/or through other inappropriate contact concerning disciplinary initiation and/or grievance resolution.

# THE ARGUMENT:

It is well established that USPS sole reliance upon the Postal Inspection Service Investigative Report – the Postal Inspection Service Investigation as substitute for management's own independent investigation – violates the tenets of Just Cause and the USPS obligation to conduct its own investigation. Further, the Collective Bargaining Agreement clearly prohibits any Postal Inspection Service and/or Office of Inspector General (OIG) attempt to influence Postal management where discipline or dispute resolution is concerned.

Even when management relies upon the Postal Inspection Service/OIG investigation as only an element of the management investigation any Postal Inspection Service/OIG attempt to influence management violates the Collective Bargaining Agreement.

This Postal Inspection Service/OIG attempt may manifest itself in the Postal Inspection Service Investigative Memorandum or other investigative report in one of the following ways:

- Omission of Information
- Alteration of Information
- Bolding, Italicizing, Underscoring, Capitalizing of Information
- Inclusion of Conclusions
- Inclusion of Opinions

Whenever the Postal Inspection Service/OIG amends the gathered evidence, alters the established facts or in any way attempts to influence management through presentation of its findings – the Postal Inspection Service/OIG has violated the Memorandum of Understanding in the Collective Bargaining Agreement. Any management investigation which includes the Postal Inspection Service/OIG's Report as an investigatory element is then tainted and in violation of both the Memorandum of Understanding and management's thorough and objective investigatory Just Cause mandate.

Here is an illustration:

The Postal Inspection Service/OIG conducts an investigation of an employee believed to be engaged in OWCP fraud. The Postal Inspection Service Investigative Memorandum/OIG Report includes many passages and references which are **bolded,** CAPITALIZED, *italicized* and underlined. The passages include certain dates, mileage numbers, names and conclusionary phrases.

The Postal Inspection Service/OIG has attempted to influence through its specific, pointed emphasis within its report.

Another illustration:

The Postal Inspection Service/OIG issues an Investigative Memorandum/Report which includes a 47 page record of several hundred POS transactions. The Postal Inspection Service/OIG edits the 47 page record and removes 22 pages. The Postal Inspection Service/OIG's explanation for the removal is that, "on those days the employee conducted the transactions properly."

Through its decision to remove the 22 pages – which reflected those days in which the employee properly performed the POS transactions – the Postal Inspection Service/OIG has attempted to influence within its Investigative Memorandum. The Postal Inspection Service/OIG made the decision and determined that those transactions properly performed must be deleted and not presented to management for consideration.

The inferences created within these two illustrations are that the Postal Inspection Service/OIG made decisions to highlight passages and bring particular attention to them and to specifically exclude other passages, thus keeping them from management review and consideration.

Can we prove influence in these two illustrations? No, probably not.

Can we prove attempts to influence in these two illustrations? Yes!!

Whenever we review a Postal Inspection Service Investigative Memorandum/OIG Report and the Report is tainted or slanted through inclusion/exclusion, emphasis, additions, conclusions or opinion the Postal Inspection Service/OIG is in violation of the Memorandum of Understanding. When management then reviews and/or uses the Investigative Memorandum as part of its investigation, management violates the Memorandum of Understanding and its Just Cause obligation to conduct a fair, thorough and objective investigation.

THE "KALKINES" WARNING

The Office of Inspector General investigators utilize a form identified as the "Kalkines" Warning.

Within this form the following is stated - by the OIG:

**UNITED STATES POSTAL SERVICE**
**OFFICE OF INSPECTOR GENERAL**

ADMINISTRATIVE WARNING: DUTY TO COOPERATE

_____ 2. You have a duty to reply to these questions. Agency disciplinary proceedings, including your dismissal, may be initiated if you refuse to answer or fail to reply fully and truthfully.

_____ 4. YOU ARE SUBJECT TO DISCIPLINARY ACTIONS UP TO AND INCLUDING DISMISSAL IF YOU REFUSE TO ANSWER OR FAIL TO RESPOND TRUTHFULLY AND FULLY TO ANY QUESTIONS, OR GIVE MISLEADING INFORMATION.

OIG inclusion and reference to Discipline in the Kalkines Warning is a threshold violation of our CBA. The Postal Inspection Service and OIG are specifically prohibited from any involvement in the Article 15 Dispute Resolution Process and Article 16 Disciplinary matters. The Kalkines Warning specifically includes references and threatens disciplinary procedures against employees.

Whenever the Kalkines Warning is shown to our represented employees, the USPS is in violation of the CBA. These violations are to the MOU, the JCIM and the Anthony J. Vegilante correspondence to President Burrus dated 3/22/2005 in which the USPS assures, "Please be advised that pursuant to the enclosed memorandum, certain types of work place investigations of employee misconduct are being transitioned to the Office of Inspector General from the Inspection Service. This transition will not restrict, eliminate, or otherwise adversely affect any rights, privileges, or benefits of either employees of the Postal Service, or labor organizations representing employees of the Postal Service, under Chapter 12 of Title 39, United States Code, the National Labor Relations Act, any handbook or manual affecting employee labor relations, or any collective bargaining agreement.

Even if the employee refuses to sign the Kalkines Warning, the fact that the OIG office profers it to an employee crosses the line of OIG involvement in the Disciplinary process.

We must raise this contention at Step 2 as a serious CBA violation and another breach of the processes due our grievant.

# THE COLLECTIVE BARGAINING AGREEMENT

The Memorandum of Understanding, Joint Contract Interpretation Manual and EL921 all provide solid Collective Bargaining Agreement based reference prohibiting Postal Inspection Service/OIG influence and affirming the management investigatory obligation:

**MEMORANDUM OF UNDERSTANDING**
**ROLE OF THE INSPECTION SERVICE IN LABOR RELATIONS MATTERS.**

The Postal Inspection Service has an obligation to comply fully with the letter and spirit of the National Agreement between the United States Postal Service and the American Postal Workers Union, AFL-CIO and will not interfere in the dispute resolution process as it relates to Articles 15 and 16.

The parties further acknowledge the necessity of an independent review of the facts by management prior to the issuance of disciplinary action, emergency procedures, indefinite suspensions, enforced leave or administrative actions. Inspectors will not make recommendations, provide opinions, or attempt to influence management personnel regarding a particular disciplinary action, as defined above. (underscoring added)

**JUST CAUSE TEST**
**EL921 SUPERVISOR'S GUIDE TO HANDLING GRIEVANCES**

**Was a thorough investigation completed?**

Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective.

**ROLE OF INSPECTION SERVICE**
**JOINT CONTRACT INTERPRETATION MANUAL - ARTICLE 15.5C**

The Postal Inspection Service has an obligation to comply fully with the letter and spirit of the National Agreement and may not interfere in the dispute resolution process as it relates to Articles 15 and 16.

An independent review of the facts by management is required prior to the issuance of disciplinary action, emergency procedures, indefinite suspensions, enforced leave or administrative actions. Management is not precluded or limited from reviewing Inspection Service documents in making a decision to issue discipline.

**THE JUST CAUSE TESTS**
**JOINT CONTRACT INTERPRETATION MANUAL - ARTICLE 16.1**

These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

**Was a Thorough Investigation Completed?**

Before administering the discipline, management should conduct an investigation to determine whether the employee committed the offense. The investigation should be thorough and objective.

In addition, the previously cited correspondence between the USPS and APWU clearly assures that the Office of Inspector General is bound to our Collective Bargaining Agreement as is the Postal Inspection Service:

**3/22/2005**

| | | |
|---|---|---|
| **Anthony J. Vegilante** | **to** | **William Burrus** |
| **Vice President** | | **President** |
| **Labor Relations** | | **APWU** |

Please be advised that pursuant to the enclosed memorandum, certain types of work place investigations of employee misconduct are being transitioned to the Office of Inspector General from the Inspection Service. This transition will not restrict, eliminate, or otherwise adversely affect any rights, privileges, or benefits of either employees of the Postal Service, or labor organizations representing employees of the Postal Service, under Chapter 12 of Title 39, United States Code, the National Labor Relations Act, any handbook or manual affecting employee labor relations, or any collective bargaining agreement. (underscoring added)

# THE INTERVIEW:

Establishing reliance upon the Postal Inspection Service/OIG's investigation as part of management's investigation prior to its initiation of discipline is critical in successfully arguing Postal Inspection Service/OIG "attempt to influence." Questions for the initiating supervisor will cement the nexus between the Postal Inspection Service/OIG attempt(s) and the required management investigation. Here are some illustrations of potentially valuable questions:

**INVESTIGATING AND INITIATING SUPERVISOR**

- Did you rely upon the Postal Inspection Service/OIG Investigative Memorandum as part of your investigation prior to initiating discipline?

- Did you rely upon the Postal Inspection Service/OIG Investigative Memorandum as a proper investigation into Mr. Smith's conduct prior to initiating the discipline?

- Was the Postal Inspection Service/OIG Investigative Memorandum an accurate reflection of the Postal Inspection Service/OIG investigation into Mr. Smith's conduct?

- Was the Postal Inspection Service/OIG Investigative Memorandum a fair and thorough report of the Postal Inspection Service/OIG investigation?

- Did the narrative of the Postal Inspection Service/OIG Investigative Memorandum accurately report the sworn witnesses' statements included within the Postal Inspection Service/OIG Investigative Memorandum?

- Did the Postal Inspection Service/OIG Investigative Memorandum omit any facts the Postal Inspection Service/OIG uncovered in its investigation of Mr. Smith?

- Did the Postal Inspection Service/OIG Investigative Memorandum alter any facts the Postal Inspection Service/OIG uncovered in its investigation of Mr. Smith?

- Did you review the sworn statements contained within the Postal Inspection Service/OIG Investigative Memorandum?

- Did you review the documents contained within the Postal Inspection Service/OIG Investigative Memorandum?

- Did you interview Postal Inspector/OIG Jones during your investigation prior to initiating discipline?

# THE ARBITRATORS:

A solid foundation of valuable arbitral reference has developed regarding the Postal Inspection Service and its Collective Bargaining Agreement violative attempts to influence. Here are what some of those insightful umpires say:

***Arbitrator Klein*** ***Case No.C00C-4C-D 06003962***
***Warren, PA*** ***June 16, 2006*** ***Pages 13, 14 & 17***

"Although the Arbitrator is of the opinion that the Postmaster's inquiry into the grievant's conduct went beyond that of the Inspection Service in that the Postmaster listened to the grievant's explanations for what occurred and gave her a significant amount of time to corroborate her claims, the fact remains that the Memorandum pertaining to the Role of Inspection Service in Labor Relations Matters was violated to the extent that the discipline cannot stand.

As stated by Arbitrator Kelly in Case No. C00C-4C-D 04041371, Sentereri, "In almost every paragraph of the IM there is an emphasis that amount to an attempt to influence postal management." The same is true in the instant case and this Arbitrator is of the opinion that it is the "attempt to influence" Management which constitutes a violation of the cited Memorandum.

A careful examination of the IM shows that it is prejudicial to the grievant and slanted against the grievant when it should only reflect the facts gathered during the investigative process. Whether there was a deliberate intent to attempt to influence Management or not, the fact remains that the IM contains conclusions and "bolded" statements which can only be viewed as attempts to influence Management and this is prohibited by the clear language of the Memorandum.

In brief, the Inspection Service cited "another" attempt by the grievant to avoid paying a $3.00 money order inquiry fee; they essentially accused her of having engaged in a "scheme to improperly obtain USPS funds"; they identified specific discrepancies in the grievant's statements about the value of the stamps rather than simply recite the statements and allow Management personnel to draw their own conclusions; and they alleged a history of threatening remarks from the grievant's associate; clearly, this inflammatory accusation and the inclusion of Exhibit 20 in the IM was outside the scope of the investigation of the grievant's handling of the money order and the stamps.

The Inspection Service determined that the grievant "violated" policy rather than simply provide Management with the information to be considered before determining the appropriateness of discipline at any level.

What occurred here cannot be viewed as a harmless error even though the Postmaster interviewed the grievant four times. On the basis of the accusations and "conclusionary" statements set forth in the IM, it must be held that the standards of just cause were not met here.

"Opinion

Some of the concerns the Arbitrator has in this instance as to the substantiation of the "just cause" for the grievant's discharge arise out of several inconsistencies in, and the lack of cohesiveness of, the Postal Service Inspector's "INVESTIGATIVE MEMORANDUM," together with the failure of the Postal Service Inspector and Postal Service supervision to furnish Grievant Earley with Union representation during the period immediately prior to, and during, his interview with the Postal Inspector.

The Inspection Service's "INVESTIGATIVE MEMORANDUM" in the Arbitrator's opinion, lacks the usual support this Arbitrator attaches to such Memoranda because it substitutes the Inspector's conclusions for what should be his Findings of Fact, reaches some of his conclusions on what are admitted errors in the description of some of the facts, and draws some of his conclusions without any factual support therefore.

Paragraph 1 of the "INVESTIGATIVE MEMORANDUM" is the first mention of the Inspector's conclusion that the two Disability Certificates "have been found to have been altered by Mr. Earley to gain sick leave days off work in addition to those prescribed by (his) Doctor." There is no evidence in the record to support this conclusion on the Inspector's part, nothing in the grievant's written statement made to the Inspector supports this conclusion, and the Arbitrator necessarily must find such conclusion unsupportable.

Paragraph 2 of the "INVESTIGATIVE MEMORANDUM" is worded so as to suggest that the grievant's Doctor prepared a response on June 9, 1986 to the Inspector's May 30, 1986 Questionnaire that proved that "both certificates had been altered and that no one on his staff had altered the dates." While on direct testimony the Inspector stated that the "INVESTIGATIVE MEMORANDUM" was a "true and accurate account of the information" he had secured, and asserted that he had read the complete "INVESTIGATIVE MEMORANDUM" and its attachments before he signed it, on cross-examination he admitted that this statement was in error, that he had just noted on the morning of the arbitration hearing that he had apparently shortened the paragraph from its original form, that the paragraph was meant to indicate that the Doctor was responding solely to the questions dealing with the February 1986 Disability Certificate, and that his reference to "both certificates" was an error and was incorrect.

On further cross-examination the Inspector testified that the Doctor stated he had given the grievant Disability Certificates both in February and June 1986, that he had not included the terminating times on the Certificates that the grievant had substituted, and that the total period of time covered by the two Certificates was more extensive than that given on the Certificates as originally prepared. The Arbitrator finds it somewhat difficult to understand how this conclusion could have been reached with exactness by the Doctor in that, when requested in the Questionnaire for the February 19, 1986 Disability Certificate as to "what date was to be entered in that space," the Doctor recorded his answer as "Uncertain from our records." The uncertainty engendered by the Doctors reply in this particular casts doubts on the contents of Paragraph 2 of the "INVESTIGATIVE MEMORANDUM."

Paragraph 3 of the "INVESTIGATIVE MEMORANDUM" asserts the Inspector's conclusion that the grievant "altered the return-to-work dates on the Certificates to gain additional days off from work." As noted above, there is nothing in the record to prove that the grievant made the admitted alterations in the Certificates "to gain additional days off from work."

The content of Paragraph 4 of the "INVESTIGATE MEMORANDUM" is apparently directed to refuting the grievant's contention that he had been authorized to alter the return-to-work dates on the two Disability Certificates that had been prepared by the Doctor's office. It is to be noted that attached to the August 11, 1986 "INVESTIGATIVE MEMORANDUM" was a "MEMORANDUM OF INTERVIEW" by the Postal Inspector of the Doctor involved, which interview had been conducted on August 4, 1986, but had not been recorded in the "MEMORANDUM OF INTERVIEW" until August 11, 1986, the same date as the Inspector composed his "INVESTIGATIVE MEMORANDUM." In the second paragraph of the Inspector's August 4, 1986 report of his interview of the Doctor the Inspector noted: "After discussing the slips with his three office personnel, Dr. C. stated that no one in his office had advised Mr. Earley to take days off in addition to those originally set forth on the Certificates, and no one had authorized Mr. Earley to change the return-to-work dates on the Certificates." In the Inspector's summary of this interview recorded in Paragraph 4 of the "INVESTIGATIVE MEMORANDUM" he states: "Dr. C. was interviewed on August 4, 1986 (Exhibit E) and <u>related</u> that Mr. Earley had not been told to extend his incapacitation and not authorized to alter the return-to-work date on the Disability Certificate that had been prepared by his office." (Underlining added.)

In the above quotation it is to be noted that the Inspector refers to the information there cited as having been "related" to him. On direct examination at the arbitration hearing the Inspector testified that "in my presence Dr. C. asked his staff if anyone had told Earley to take added days off from those recorded on the Certificates." On cross-examination the Arbitrator's hearing notes indicate that the Inspector was uncertain as to whether the Doctor had questioned the three members of his staff separately or together as to possible telephone contacts with Grievant Earley, or whether he heard the content of the Doctor's questioning of his staff or their answers thereto.

In view of the Arbitrator's findings relative to the inaccuracies and inconsistencies in the Postal Inspector's "INVESTIGATIVE MEMORANDUM" which had been the sole basis for the Postal Service's decision to discharge Grievant Earley, the failure of the General Supervisor and the Postal Inspector to provide him with requested Union representation, the failure of supervision to notify him of its intent to discipline him, its concomitant failure to provide him with the opportunity to advance explanations in response to the charges pending against him, and the lack of merit of the reasons presented in support of his discharge, all combine to cause the Arbitrator to sustain the instant grievance. The Arbitrator, therefore, will direct that the discharge be rescinded and expunged from the grievant's record, and that he be returned to his job within two (2) weeks of the date of this Decision with all Agreement rights reestablished unimpaired."

***Arbitrator Fletcher*** ***C0C-4M-D09549;C0C-4M-D 12003***
***<u>Flint, MI</u>*** ***<u>February 13, 1992</u>*** ***<u>Pages 14-16</u>***

"The second reason why the discipline is flawed is the failure of Grievant's supervisors to conduct there own inquiry into the matter before issuing discipline. It is recognized that there are two lines of arbitral authority on this issue. This Arbitrator finds that the line of authority that requires supervisor to conduct at least some type of independent investigation instead of merely relying on the contents of

an Investigative Memorandum to be the better reasoned decisions and more in harmony with the due process requirements of the Agreement. In this regard see S4C-3S-D 5303, Marlatt, Arb., (1987), and the awards mentioned therein, as well as S7C-3D-D 3801, Gold, Arb., (1992), where it is stated:

> Any Supervisor who relies solely on the findings of the Inspection Service does so at this or her own peril. Postal Management has the responsibility of conducting a full investigation of any actions that may result in the assessment of discipline. An IS report is just one element or factor that must be weighed and it cannot be presumed to be accurate or true without independent analysis.

Further in this regard it is noted that the award in AB-E-1057-D, Dash, Jr., Arb., (1974), references a September 13, 1973 IMPLEMENTATION OF MEMORANDUM OF UNDERSTANDING, wherein the Postal Service "specifically prohibited (the Inspection Service) from providing management with any recommendations or opinions as to the disciplinary action management should take" in a given case. This proscription, as a principle, is sound and had ought not be constructively circumvented by supervisors proceeding to discipline solely on the basis of the contents of an IM. IM's can be written, and often times are, in manner that makes allegations appear as fact. The process of selecting what material to include and what material to exclude is subjective on the part of the writer. It would not be too difficult to structure an IM so that it actually made recommendations and/or expressed opinions as to discipline without actually stating them. It is a recognized fact that many supervisors accept the contents of an IM as factual and conclusive simply because it has been prepared by the Inspection Service. Thus, the IM need not specifically propose discipline to have the supervisor believe that discipline is necessary.

This is one of the cardinal reasons why it is necessary for the supervisor to make his own objective inquiry. The Handbook EL-921, Supervisor's Guide to Handling Grievances, stresses that personnel matters must be approached objectively. Also, the handbook notes that a thorough investigation is required and in fact mentions "just cause." Accordingly, in this matter because the supervisors issuing the proposed removal and the removal, in fact, did not conduct even an elementary investigation of their own, but instead, made their determination to discipline and approve discipline solely on the basis of an IM, and, further, did not even view the videotape which was made of the alleged transaction to determine if critical aspects of the investigation were correct as recorded in the IM, all ensuing discipline is flawed."

***Arbitrator Simmelkjaer*** ***A00C-1A-D 04053136***
***Edison, NJ June 3, 2004 Pages 27 & 28***

"In this regard, the Union makes a cogent point that the IM was incomplete and Supervisor Kaniuk's reliance on the videotape as a pivotal part of her decision to issue the NOR was flawed. It is also noteworthy that Supervisor Kaniuk made no effort to view the remainder of the tape after the Grievant's P.D.I. when she was made aware of the missing parts of the videotape. Conceivably, exculpatory evidence was contained in the excluded portions of the tape which were neither reviewed by management nor made available to the Arbitrator."

"A significant medical document was not considered by either the Inspection Service or the MDO. On March 31, 1997, the grievant's doctor had provided a statement regarding the grievant's need to be off duty on March 26 and March 27, 1997 due to shoulder spasms. A copy of this information was also sent to Injury Compensation. This information was readily available when the decision was made to place the grievant off duty.

Another flaw in this case is found in Item 15 of the Investigative Memo.

> 15. Employee Wojtaszek, by failing to provide Postal Service management with true and correct information as to her physical status, deprived the Postal Service of her labors. Employee Wojtaszek, by failing to provide Postal Service management with true and correct information was provided with injury-on-duty compensation to which she was not entitled.

The above statement is conclusionary and constitutes an "attempt to influence management personnel regarding a particular disciplinary action." Providing such an opinion is not part of the "role of the Inspection Service in labor relations matters."

***Arbitrator Cannavo*** ***A94C-4A-D 97112964***
***Elizabeth, NJ*** ***April 20, 1999*** ***Pages 30-32***

"In this regard, Postal Inspector Starks concluded that the Grievant and Paras were engaged in a stock lending scheme to cover shortages during audits. He also **speculated** that Paras made a "mathematical error" when he told Ashley that he took $320.00 from the Grievant and if he hadn't done so, the subsequent audit would not have been conducted and he would have been in tolerance. What is more, in her testimony, Supervisor Ashley also stated that the Grievant and Paras were engaged in a stock lending scheme. The Arbitrator finds that there is no basis in fact for Inspector Stark's conclusions. These conclusions were purely speculative and without foundation. To her credit, the Advocate for the Postal Service recognized that Starks' testimony in this regard was purely speculative and certainly harmful to her case. She knew that there was no proof in the record for such a conclusion and in her closing brief implored the Arbitrator not to draw any conclusions from this speculation and offered that it was only background.

It is no coincidence that Supervisor Ashley concluded that she believed that Paras and the Grievant were engaged in a stock lending scheme. Her words parroted those of Starks. In this regard, the Arbitrator finds that the spirit of the Memorandum of Understanding Re: Role of Inspection Service in Labor Relations Matters was clearly violated. It states clearly and unambiguously that: "Inspectors will not make recommendations, provide opinions, or attempt to influence management personnel regarding a particular disciplinary action, as defined above." In the instant case, Inspector Starks provided an opinion to both Ashley and the Arbitrator and, in doing so, influenced Ashley's decision regarding the issuance of discipline.

In further regard to Inspector Starks' theory and opinion about a stock lending scheme, the Arbitrator agrees with the Advocate for the Union. He pointed out that there would be absolutely no reason for Paras to be engaged in such a scheme because he is the T-6 and had access to as such stock as he would have needed from the Unit Reserve.

The Arbitrator also finds that the Postal Inspector failed to conduct a complete investigation. This Arbitrator has consistently held that the Inspection Service can conduct an investigation in lieu of a supervisor since the Inspection Service is the investigative arm of the Postal Service. However, this Arbitrator has also held that the Inspector can conduct no less an investigation than what a supervisor would have conducted. After having been told that employees at this station routinely swap stock without a Form 17, it was incumbent upon the Postal Inspector to conduct a station audit and have all the window clerks audited. Such an audit would have determined if other window clerks had the Grievant's stock or had it and disposed of it. However, once Inspector Starks made the determination that there was a stock lending scheme, he shut off the possibility of a complete investigation. What is more, the Inspector did not even interview the other window clerks to determine if the Grievant's assertions about selling and trading stock with a Form 17 was true. He even admitted that he decided to omit the other window clerks from consideration. Therefore, it is not unreasonable to conclude that Inspector Starks did, in fact, have a preconceived notion of what happened and consequently failed to fully investigate all the facts."

***Arbitrator Klein*** ***C94C-1C-D 97047605/97059390***
***Harrisburg, PA*** ***November 17, 1997*** ***Pages 17 & 18***

"There is also merit to the Union's assertion that the Investigative Memorandum as "slanted against" the grievant. The memo quotes profanity which Mr. Hayes claims was uttered by the grievant. The grievant's written statement contains reference to similar profanity used by Mr. Hayes, but those remarks are excluded from the memo. There can be no doubt that Mr. Hayes engaged in such conversation because he so testified.

The narrative portion of the memo reflects that Mr. Williams told the Inspector that "Mr. Hayes pointed his finger at Mr. Stegall"; Mr. Williams' written statement refers to Mr. Hayes thrusting "his arm out" and shoving "his finger in Ron's face". Similar differences are found between Mr. Rondeau's statement and the Inspector's account thereof.

Significantly, the Inspector included several letters from Area Storage and Transfer which constituted complaints against the grievant. The inclusion of such letters was clearly detrimental to the grievant's position here for the reason that they contained "unsubstantiated hearsay" from other contract drivers. For example, on December 13, 1996, Ms. Demchak wrote, "I know that he has threatened other companies' employees as your own. I also understand how hard it is in your system to dismiss an employee but lives are in danger physically and mentally." Such allegations were prejudicial to the grievant and should not have been included in the memo."

"Secondly, the Removal action and the Investigative Memorandum violated the parties' Memorandum of Understanding Re: "Role of Inspection Service in Labor Relations Matters." That Memorandum provides:

> The parties further acknowledge the necessity of an independent review of the facts by management prior to the issuance of disciplinary action, emergency procedures, indefinite suspensions, enforced leave or administrative actions. Inspectors will not make recommendations, provide opinions, or attempts to influence management personnel regarding a particular action, as defined above.
>
> Nothing in this document is meant to preclude or limit Postal Service management from reviewing Inspection Service documents in deciding to issue discipline(emphasis added).

This Investigative Memorandum clearly attempted to influence Haddonfield management regarding this disciplinary action. A couple of examples will show this. In the first paragraph of the IM, the tone is set as follows:

> On January 25, 2002, her doctor reported he expected her to return to work approximately April 1, 2002 (Exhibit 2). But **OVER ONE YEAR AND FOUR MONTHS LATER**, Ms. Senteneri still claimed to be totally disabled from work (emphasis in original).

The style continues throughout. For example, paragraph 4 includes the following:

> But, on January 7, 2003 Ms. Sentereri was observed driving her car in Ellwood City, PA which is **364 MILES AND 6 HOURS DRIVING TIME** from her residence in Sicklerville, NJ.

In almost every paragraph of the IM there is an emphasis that amounts to an attempt to influence postal management. For example, the word "malingering" is typed in bold and capitalized every time it appears.

To make matters worse, the investigation conducted by the Inspectors and adopted by management was not necessarily accurate. As noted, the claims that the Grievant drove to and gambled in Atlantic City on 41 times in a year is based on a review of her account activity at Caesar's Casino. There is no mention in the IM of a direct observation of the Grievant driving to or gambling in Atlantic City. At most, there is a line in paragraph 7 that she was observed driving to Atlantic City on January 9 with no detail. Despite the fact that the Grievant denied driving to Atlantic City or gambling on the dates listed, Inspectors relied solely on the account report from Caesar's.

At the arbitration hearing, the Grievant testified that she did not go to Atlantic City to gamble. She admitted that her fiancé, Richard Kruger, drove her to Ellwood City to see relatives on six occasions during the time in question, but she denied going to Atlantic City to gamble. She testified that Kruger used her Caesar's account card to gamble. Kruger also testified that he used the Grievant's Caesar's

account card to gamble because she got better "comps". Both Inspectors and management ignored the Grievant's protestations that she did not go to Atlantic City. No one interviewed Kruger. If management had not simply relied on the IM but had also conducted its own independent investigation, they might have questioned the conclusion that the Grievant drove to Atlantic City 41 times. Because no one dug any deeper, this perhaps erroneous "fact" was part of the decision to remove the Grievant."

Many times the Postal Inspection Service has altered, excluded from or editorialized their investigation to "assist" and "boost" management toward justifiable discipline. Whenever the Postal Inspection Service/OIG makes any such attempt, they have violated the Collective Bargaining Agreement. These violations are also serious denials of due process as well as Just Cause breaches.

## CHAPTER 21

# THE ISSUE: <u>USPS WITNESS AS INITIATOR OF DISCIPLINE</u>

# THE DEFINITION:

The Supervisor/manager who initiates a disciplinary action cannot also serve as a witness against the defendant.

# THE ARGUMENT:

Under the Just Cause test umbrella of the required thorough and objective investigation, a management representative who is witness to an alleged act of misconduct cannot be expected to possess the necessary objectivity required by management's obligation to thoroughly and objectively investigate before the initiation of discipline. This is particularly true when the supervisor/manager is the subject, or alleged "victim" of the employee's act. It is unreasonable to believe the "victim" could step out of that role to – with any semblance of fairness and balance – gather all the evidence and weigh that evidence in a potential disciplinary scenario and make an unbiased decision to either initiate – or not initiate – discipline.

**<u>ILLUSTRATION</u>:**

Supervisor Jones requests that Clerk Beck report to the Window area to assist customers. Clerk Beck approaches Jones and states, "Get someone junior to me. I'm not going and I'm sick of all your bull - - - - about requiring me to go do junior employees' jobs. Clerk Beck is very heated, very loud and within inches of Jones while he yells all this.

Later that day, Jones issues a 14 day suspension to Beck charging "Conduct Unbecoming a Postal Employee;" "Violation of USPS Standards of Conduct" and "Insubordination."

Obviously Supervisor Beck – berated and humiliated on the workroom floor in front of staff and customers can now objectively investigate, consider potential mitigating factors and make an unbiased, fair and balanced decision about Jones' disciplinary fate.

**NOT!**! Such a presumption of balance is wholly unreasonable and unrealistic. Mr. Jones – to be in compliance with the thorough and objective Just Cause mandate – would have to turn over the investigation to another, not involved, non-witness-to-the-event management representative. That USPS representative then would be charged with gathering all the facts – through evidence – in order to make an informed, fair, objective and thorough investigation and ultimate decision.

# THE COLLECTIVE BARGAINING AGREEMENT

Article 19's EL921 Handbook, "Supervisor's Guide to Handling Grievances" includes the Tests of Just Cause and with those tests the USPS obligation to conduct the kind of an investigation for which we are arguing:

**"Was a thorough investigation completed?**

Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective.

This is the employee's day in court privilege. Employees have the right to know with reasonable detail what the charges are and to be given a reasonable opportunity to defend themselves before the discipline is initiated."

**JOINT CONTRACT INTERPRETATION MANUAL - ARTICLE 16.1**

**JUST CAUSE PRINCIPLE**

These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

**Was a Thorough Investigation Completed?**

Before administering the discipline, management should conduct an investigation to determine whether the employee committed the offense. The investigation should be thorough and objective.

The investigation should include the employee's "day in court privilege." The employee should know with reasonable detail what the charges are and should be given a reasonable opportunity to defend themselves before the discipline is initiated.

## THE INTERVIEW

Establishing lack of objectivity is possible – and very important – utilizing the interview of the USPS management representative who is serving as both witness against the employee and as investigator, initiator and decision maker for the discipline:

- You were the subject of Mr. Beck's outburst?
- He was insubordinate to you?
- This happened in front of other employees?
- This happened on the workroom floor?
- You felt no need to interview Beck because you saw his behavior first hand – as the victim?
- You knew he was guilty of insubordination because you were witness to his refusal to report to the Window?
- You initiated the 14 day suspension based upon his actions and behavior?
- You conducted the Pre-disciplinary Interview?

It is reasonable to expect that a "victimized" manager/supervisor will not resist attesting to his/her involvement in the investigation and initiation of "Just" discipline. The inescapable conclusion, however, derived from the "victim's" interview, will be an almost total lack of possible objectivity, fairness and balance.

If the USPS representative is not the "victim" but is a witness to the event or conduct, our argument still holds. That USPS representative would properly be an element of the USPS investigation but would not properly be the investigator and initiator of discipline. Someone who was not a witness would always be the fairer, more objective and unbiased individual.

## THE ARBITRATORS

Arbitral authority regarding the Initiator as Witness is not extensive.

It has not been largely and aggressively pursued as a Due Process and Just Cause defense. However, the seminal Just Cause Arbitrator – Carroll Daugherty did include this important process as due within his benchmark Just Cause Tests:

4. Was the company's investigation conducted fairly and objectively?

Note 1: At said investigation the management official may be both "prosecutor" and "judge," but he may not also be a witness against the employee.

Note 2: It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employee and a management person, there are not witnesses to an incident other than the two immediate participants. In such cases, it is particularly important that the management "judge" question the management participant rigorously and thoroughly, just as an actual third party would.

## CHAPTER 22

# THE ISSUE: PLACEMENT IN OFF-DUTY STATUS – EXCESSIVE DURATION

# THE DEFINITION:

The duration of the Article 16.7 Emergency Placement is unreasonable and/or not commensurate with the circumstances/emergency definition in Article 3.

# THE ARGUMENT:

Often the U.S. Postal Service utilizes its broad authority to place an employee on Emergency, Off-Duty Status - and then continues the 'suspension' of the employee for a duration far exceeding the nature of the incident and the need for the employee to be off the premises and off the clock. As stated in Chapter 17, "the usual purpose of the Emergency Procedure was for immediate diffusion of a possibly volatile situation – as an emergency". The U.S. Postal Service often misinterprets and misapplies Article 16.7 to, somehow, mirror the "Indefinite" provisions of Article 16.6. There is no 'Indefinite' element in Article 16.7. We must, through our investigation and argument, develop proof that the emergency, if it actually existed, ceased at the point in time most reasonable and consistent with Articles 17.3 and 3.

An illustration:

Two employees argue on the workroom floor. The argument is heated with some loud, abusive language – even profanity. A supervisor/postmaster makes the decision to send both employees home under Article 16.7. This happens on Monday the 1st at 9:00 AM. The Office of Inspector General/PIS is not contacted - nor are local law enforcement authorities. The employees are told not to return until notified. Two weeks later, on Monday the 15th, management contacts them to tell them to report for duty. When they report they are each given a Pre-Disciplinary Interview which results in each receiving a 7 day suspension for "Conduct Unbecoming An Employee" detailing the argument/incident from the 1st.

In this scenario a number of arguments must be raised:

1. With no intervening investigation occurring until the 15th, the duration of the 16.7 placement was unreasonable and excessive;

2. The incident occurred at 9:00 AM on the 1st. The "cooling off" period "to diffuse the incident" extended for <u>two weeks</u>. This is an abuse of management authority and inconsistent with the Article 3 definition of an emergency. Clearly, the "emergency" occurred at 9:00 AM on the 1st – with no evidence of that "emergency" existing <u>beyond</u> what happened immediately proceeding the Emergency Placement.

3. Article 16.7 was used not only to emergently place the two protagonists, but <u>it was then used to extend and suspend</u> each of them for two weeks. Article 16.7 does not provide for imposition of continuation, follow-up, no emergency discipline-suspension or otherwise.

4. The non-emergency 14 day suspension imposition under Article 16.7 is outside 16.7 and constitutes Double Jeopardy as the U.S. Postal Service later issued each a 7 day suspension for the same incident - based upon the same fact circumstances.

These arguments must all be made as soon as is possible – but no later than at Step 2. More often than not the U.S. Postal Service extends the Emergency Placement well beyond any reasonable 16.7 based application.

# THE COLLECTIVE BARGAINING AGREEMENT

### Article 3 MANAGEMENT RIGHTS

**"…F. Emergency Situations** … i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature." (Emphasis and underscoring added).

### Article 16 DISCIPLINE PROCEDURE

**"Section 7. Emergency Procedure**

An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance."

**JOINT CONTRACT INTERPRETATION MANUAL – ARTICLE 16.7**

***EMERGENCY PLACEMENT***

The purpose of Article 16.7 is to allow the Postal Service to place an employee in an off-duty status immediately in the specified "emergency" situations.

## THE INTERVIEW

Establishing what management did after the Emergency Placement is crucial to supporting successful excessive or improper 'duration' arguments. If we do not conduct interviews the U.S. Postal Service will manufacture all manner of creative reasons and excuses for extending the emergency suspension. Here are some suggestions:

- What time did the incident occur?
- What time did you place Jim Toms in Emergency Off-Duty status?
- What did you tell Jim Toms regarding reporting back to work?
- After the incident did you contact the:

  Office of Inspector General?
  Postal Inspection Service?
  Police?

- After the incident what was your next contact with Jim Toms?
- When did Jim Toms return to work?
- In between the June 1st incident and Jim Toms' return to work did you gather any evidence about the June 1st incident?
- What did you gather?
- When did you accumulate this?

If the supervisor/manager claims he/she spoke to the Office of Inspector General, Postal Inspection Service, Police, Witnesses, etc. we must follow-up and interview those claimed individuals as elements of evidence. This is necessary to corroborate/refute the supervisor/postmaster's version of their investigation and the nature of the extended 16.7 suspension.

# THE ARBITRATORS

Increasingly, Arbitrators are embracing to our arguments on excessive duration of the Emergency Placement. Here are some of the more useful references:

***Arbitrator Michael J. Pecklers, Esq.*** ***Case No. C06C4CD10255018***
***Riverside, NJ*** ***August 15, 2011*** ***Pages 18-19***

"While that is true, I respectfully disagree with the conclusion reached by my colleague for a number of reasons. Initially, the result ignores a well-established body of Regional authority that such determinations must be made on a case-by-case basis, which out of fairness, may not have been presented. Additionally, while it is true that the burden is on the Union to prove that the action of Management in waiting to make a decision was arbitrary and capricious or discriminatory as Arbitrator Sharkey opines (by making a *prima facie* showing that there was apparently no reason to justify the delay), this analysis does not account for the shifting of the burden back to the Postal Service to demonstrate that its actions were reasonable under the circumstances.

Based upon the totality of the foregoing considerations, I find that the grievance must be **SUSTAINED IN PART**. Accordingly, while the initial EP was properly issued, the duration of 8 months was not countenanced by Article 16.7. I am mindful of the fact that the Grievant ultimately resigned in January 2011, in conjunction with a plea arrangement reached with the U.S. Attorney. There is no indication in the record, however, that Postal Management was cognizant this was in the offing, and delayed any further action in anticipation of the same. Moreover, while the postmaster was aware in global terms that this was before the United States Attorney, his testimony was abundantly clear that neither he nor Labor Relations had any idea of the status of the case. Under these circumstances, there was an affirmative obligation to either issue an NOR, as all facts were adduced by April 20th; to convert the EP to an Article 16.6 Indefinite Suspension Crime Situation; or to press the OIG or the US Attorney for a briefing. Because no action was taken, the Grievant is entitled to receive back pay for a reasonable period of time until the effective date of his resignation. Limited to the discrete facts of this case, I believe an additional 30 days would have been sufficient for Management to act. In so finding, I have declined to accept the Postal Service's invitation to *read-in* equity considerations related to the admitted seriousness of these actions, and the incentive my ruling may provide for future pilferage, as I believe the same would require me to violate my *four corners* obligation".

"Finally, the Union argues that the emergency suspension lasted too long. On this issue, Management's response is terse: it took the Inspectors three to four weeks to get their investigatory report to the Postmaster. The record contains no hint or clue as to why it took the Inspectors three to four weeks. They had done a considerable amount of preliminary investigatory work; and they apparently had a video, the report of a test shopper, and the investigatory interview results including-as far as this record shows-Ms. Zandi's confession. The record suggests no excuse for a three to four week delay in the production of the report that pull those elements together. Emergency suspension is a draconian step, and arbitrator Mittenthal's National level award establishes that it is a disciplinary action. Part of an employer's just cause burden in any disciplinary action is to show that the degree of discipline-in this case, the duration of the emergency suspension-was not unreasonable. Without that requirement, emergency suspension would become an indefinite suspension of the employee's just cause rights, a sort of disciplinary black hole. The Service failed to carry that part of it burden in this case.

Ms. Zandi must be made whole for the unexplained delay in ending her emergency suspension status. That requires some estimate of the *reasonable* period for the production of the Inspectors' report. To repeat, the record does not suggest that any part of the investigative factfining remained to be done after the date of Ms. Zandi's emergency suspension. I am left to my own experience of writing time. My outside estimate of the reasonable time for production of the Inspectors' report is three days. (It seems to me that if an arbitrator charged the Service for more than three days of writing time to produce a comparable work product, based on a record similar to the one that the Inspectors had do deal with, the Service would go through the roof, and quite correctly, too.) I do not mean to suggest that is would not be possible for a better-developed record to justify a longer production time for the Inspector' report.[1] But in the absence of *any* explanation for the delay, the extension of the emergency suspension beyond three days was not for just cause.

In short, Management reasonably decided to leave the investigation of the continuing shortages to the Inspection Service; and the Postmaster took reasonable action as soon as the Inspectors told him that Ms. Zandi was "confessing" and was "up to $700." That situation falls squarely within the elicit language of Section 16.7. The grievance was processed properly (particularly considering that there is no challenge to the Postmaster's making the emergency suspension decision). But the delay in the Inspectors' report, and the resulting extension of the emergency suspension, was unsupported in the record and was not for just cause.

[1] The obvious candidate for explanation of a delay would be "press of business." But I am not at all sure how much sympathy that conclusory explanation should command considering that an employee is hanging in emergency suspension awaiting the report.

**Award**

The grievance is granted to the extent that the extension of the emergency suspension was not reasonable and was not fur just cause. The Service shall make Ms. Zandi whole for her pay and benefit losses as a result of her emergency suspension beyond three business days. The grievance is otherwise dismissed.

By stipulation of the parties, I retain jurisdiction for the limited purpose of resolving issues that might arise under the general "make whole" language of the award in this case. That retained jurisdiction shall lapse 30 days from the date of this Award unless it is previously invoked or is extended by mutual agreement or for good cause shown".

***Arbitrator Lamont E. Stallworth*** ***Case No. C0C4UD19152***
***Denver, CO*** ***June 20, 1994*** ***Pages 21-23, 27***

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**"II. THE LENGTH OF TIME OF THE EMERGENCY SUSPENSION**

The Union argues, however, that even if the Service did not violate the just cause standard when it placed the Grievant on emergency suspension, the Service erred when it kept the Grievant in that status for nearly seven (7) months before issuing a removal notice. The Service argues that it needed that amount of time to complete a thorough investigation of the incident.

There may be rare, complicated situations which would take seven (7) months to investigate. However, here the situation was not that complex. The Service has offered no reasonable explanation for taking that amount of time to investigate the matter. Unusual "cloak and dagger" methods were used in this case, including scheduling clandestine meetings which never occurred, and following up on any alleged series of anonymous telephone calls.

The conduct for which the Grievant was discharged did not involve an unusual or complicated situation, or a series of incidents. The Grievant was discharged for a statement made during a very brief, finite encounter with one other individual. It also appears that it was clear from early on that there was only one witness, other than the Grievant and Mr. Lyons, who saw or heard any part of the encounter.

The Service contends that the Grievant's lack of cooperation, i.e. failure to give an oral description of the incident during investigative meetings, forced them to do additional investigation. However, the Service could not point to any specific information that the Grievant was hiding. The Service may not rely upon the Grievant to make their case. At some point, if they did not have all the information they thought the Grievant could provide, they needed to go forward anyway and argue, as they have done here, that his alleged lack of cooperation indicated that he was not telling the truth.
The Arbitrator concludes that the length of the delay here violated the due process aspects of just cause. Both psychological and financial harm to someone in the Grievant's position would be likely. Normally, a person placed on a suspension while his or her

employer investigated the possibility of discharge would be on tenterhooks until the investigation were resolved, one way or the other. Most employees would probably "put their lives on hold" anticipating a prompt resolution of the investigation. This is a case where the Arbitrator concludes that "justice delayed is justice denied." Therefore, the Arbitrator concludes that Management violated the Agreement by the inordinate amount of time the Grievant was held on suspension.

**AWARD**

The grievance is sustained in part. The Service did have have cause to place the Grievant on emergency suspension on December 27, 1992. However, the Service violated the just cause provision when it kept the Grievant on emergency suspension for a period of seven months. The Grievant is to be compensated and made whole for the period during which he was on emergency suspension, except for a two-week period.

The removal is overturned. The Grievant is to be reinstated and made whole for all losses suffered as a result of his discharge".

***Arbitrator Claude Dawson Ames*** ***Case No. F06C4FD09428312***
***Huntington Beach, CA*** ***December 28, 2010*** ***Pages 9-11***

**DECISION**

"It is long settled that Article 16.7 expressly permits the Employer to immediately place an employee on an emergency off-duty status (without pay) where the allegations against the employee involves certain specific acts of misconduct or in those cases where retaining an employee on duty may result in loss of funds or mail to the Postal Service. Given the evidence record before me, there was just and reasonable cause to place Grievant Bharati Sharma, on an Emergency Placement in an Off-Duty Status. The Inspector's observation of Grievant's handling of questionable retail transactions on two separate occasions constitute sufficient cause to believe that money and stamp stock was being taken by the Grievant. Management acted immediately to implement the provisions of Article 16.7 after being presented with the OIG's credible allegations of Ms. Sharma's theft of Postal funds.

Management responded appropriately by removing the Grievant from Postal premises in order to prevent any further loss of postal funds.

There is little or no dispute concerning the facts in this case or the Inspector's observations which lead to the Grievant's immediate emergency placement in an off-duty status by Management. The Union's primary argument stems from the length of time Grievant remained on Emergency Placement and Off-Duty (without pay) from September 18, 2009 through her effective date of removal on August 10, 2010. According to the Union, Management effectively turned an Article-16.7 Emergency Placement (emergency/temporary suspension) into an Article-16.6 Indefinite Suspension.

The Union maintains that there was no contractual reason for the Grievant to remain in limbo and in an off-duty status for an extended period of time from March 1, 2010, when Management first received the Inspector's investigative report, until her effective date of removal on August 10. 2010; a period of approximately six (6) months. The Employer argues that retaining Grievant in an emergency status during this period of time was reasonable under the circumstances given the OIG's on-going investigation. The 0IG had to complete its investigation before Management could proceed with its own independent investigation of the Grievant. In any event, the Employer has agreed to pay Grievant for the ninety (90) days prior to her effective date of removal as appropriate compensation, when she should have been charged. The Union argues, however, that Grievant is still entitled to at least six (6) weeks of additional back pay to be fully compensated, from March 1, 2010 to August 9, 2010.

The Arbitrator is in partial agreement with the Union's argument that the Grievant is entitled to some additional compensation for Management's delay. Local Managers at the Huntington Beach Post Office delayed and then extended their investigation until sometime during the second week in April. This was nearly six (6) weeks after the District Manager had received the Inspector's investigative and approximately seven (7) months after the Grievant's initial placement an off-duty status. Management never offered a satisfactory explanation for this six week delay while Grievant remained in an off-duty status without pay.

Even allowing for a two week window to receive the OIG report from the District by the local office, it was still a delay of over a month before Management initiated its own local investigation, while the Grievant remained in an off duty status and without pay.

Management then conducted a second interview with the Grievant on April 20, 2010. The Employer contends this second interview was necessary because the Grievant raised additional explanations for her behavior that needed further investigation by Management. However, the Employer never fully explained what those additional matters were, or why the Grievant could not have been charged under Article 16, instead of keeping her in a 16.7 non-pay status for such a long period of time.

Moreover, even after Management's second interview, there still was nearly a two (2) month delay before issuing the Grievant a Notice of Removal on June 22, 2010: which also was never explained. In its post-hearing brief, the Employer has acknowledged their delays in issuing Grievant a Notice of Removal, while it continued to keep her on an Emergency Placement for an extended period of time. Management has even stipulated that it would pay Grievant for this off the clock period of ninety (90) days, prior to her effective date of removal from May 11, 2010, through August 9, 2010.

However, as discussed earlier by the Union, there was an approximate six week delay in the investigation from the District Managers receipt of the Inspector's investigative report on March 1, 2010, until Management at the Ihmtington Beach office began their investigation. The Arbitrator therefore finds that Grievant is entitled to an additional

three (3) weeks of back pay compensation, from April 16, 2010 through August 9, 2010. Finally, the issue of back pay compensation would not have arisen in this case, but for Management's failure to timely charge the Grievant under Article 16.

Accordingly, for the reasons stated above, the Union's grievance is sustained.

**AWARD**

Based on the evidence record, the Postal Service had just cause, under Article 16.7 of the Agreement to place the Grievant on an Emergency Placement in an Off Duty Status. However, the Arbitrator also found that the record contained no reasonable explanation for the delay in moving ahead with further discipline after the Inspector's investigative report was received by Management on March 1, 2010. While the Employer has acknowledged these delays and stipulated to a back pay award from May 11, 2010, through August 9, 2010, the Grievant is also entitled to an additional three (3) weeks of back pay from April 16, 2010, through August 9, 2010".

***Arbitrator Garry J. Wooters*** ***Case No. B98C4BD01173640***
***Boston, MA*** ***October 7, 2003*** ***Pages 17-20***

II. The Article 16.7 Issuers

Management contends that, if the initial off-duty placement was proper, then it continues "until disposition" no matter how long that takes. I do not agree.

The right to suspend on an emergency basis "until disposition" necessarily implies that such disposition will be had within a reasonable period. Otherwise, management could remove someone from the work force, without pay, based on "allegations", and never take final administrate action, simply leaving the employee in a kind of limbo. Such a reading of Section 16.7 would risk making other provisions of Article 16 meaningless.

Where a contract provision implies a limit, but none is specifically provided, the arbitrator will read in a rule of reason. In this case, I find that when an employee has been put in an emergency, non-pay status under Article 16.7, management must act with reasonable diligence to bring the matter to "disposition." Failure to do so violates Article 16.7.1

In this case, I find that there was an unreasonable delay in bringing this mater to a final resolution. I accept that the case is complicated and that other events intervened. Yet, nothing justified a delay of more than two years during which time there was no final administrative action and no criminal charges brought.

Events in 2001 and after put significant demands on the Postal Service in general and on the Inspection Service in general and on the Inspection Service in particular. None of the events, however, were the fault of DiStasio, and they do not deprive DiStasio of his rights under the contract.

Management did not have to bring DiStasio back to work while it completed its investigation if it believed that doing so would present unacceptable risks. It could have placed him in a leave with pay status, or, taken administrative action based on what it had determined to date. There may be other options. I find only that, continuing the "emergency" placement for more than two years cannot be justified on this record.

The only remaining issue is remedy. What was a reasonable period of time for management to complete its investigation and make a final administrative determination?

The Union concedes, at least for purposes of this case, that there was cause for the initial emergency placement. The evidence supports this conclusion as well. I also agree that there was some level of complexity to this investigation. The necessary review of financial records was time-consuming and
labor intensive. Finally, there was no direct complaint about the duration of the process during the grievance process..

On these facts, I do not believe that an investigation of sixty to ninety days would have been unreasonable. I will direct that DiStasio be restored to a pay status. Management will determine if that is to be a duty status or leave with pay. DiStasio is to receive back pay for the period commencing ninety days after the emergency suspension took effect.

**Award**

The Union is enfield to raise in this case the argument that the emergency placement of the grievant in an off-duty, non-pay status violated the contract in that it continued for an unreasonable period of time.

Management violated Article 16.7 by continuing the grievant in an emergency, off-duty status from May 22 of 2001 to the present. As remedy, I direct that DiStasio be restored to a pay status. Management will determine if that is to be a duty status or leave with pay. DiStasio is to receive back pay for the period commencing ninety days after the emergency suspension took effect".

***Arbitrator Joseph W. Duffy*** ***Case No. F00C4FD06243443***
***Los Angeles, CA*** ***April 9, 2007*** ***Pages 8-9***

"The Length of the Emergency Placement

The grievant testified that she received a Notice of Removal in December 2006 to be effective January 10, 2007. The union argues that arbitrators acting under the National Agreement have ruled that the employer must show that the period of the emergency suspension was reasonable. Otherwise, as those arbitrators have reasoned, Article 16.7 could be used as an indefinite suspension.

The employer argued that the length of the Emergency Placement is irrelevant here, as the only issue is whether the employer had justification to invoke Article 16.7.

As other arbitrators had held, Emergency Placement puts an employee in an uncertain employment status. Emergency Placement serves the temporary purpose of removing an employee from the workplace to avoid further harm. Article 16.7 is, however, not meant to be an open-ended suspension. At the same time, the employer needs a reasonable amount of time after the Emergency Placement to investigate and prepare the case before taking any further disciplinary steps. The amount of time needed cannot be determined with scientific accuracy. Each case must be evaluated on its own facts.

In this case, the employer put the grievant on Emergency Placement on August 15, 2006 (confirmed by letter on August 21). Notes in the file show that the employer attempted to interview the grievant further on August 31, 2006, but the notes indicate the grievant declined to be interviewed on the advice of her attorney. (J2, p. 32-34). The OIG issued its Report of Investigation on September 19, 2006. (J4). Nothing in the record before me explains why the employer waited until December to issue the Notice of Removal.

**Award**

I find that the employer acted properly under Article 16.7 when it issued the Emergency Placement to the grievant and that action by the employer is sustained. Under the circumstances, however, I find the unexplained delay in moving ahead with the Removal is unreasonable. The delay in taking further action on the matter entitles the grievant to a limited back pay remedy. I find that the employer had the information and could have taken action by the end of September 2006. Therefore, I direct that the employer make the grievant whole for lost wages and benefits for the period from October 1, 2006 to the effective date of the Removal, which is January 10, 2007. In awarding this limited remedy, I am in no way ruling on the validity or lack of validity of the employer's decision to remove the grievant, as that matter is not before me".



"While the Grievant's emergency placement was proper, the Postal Service has not advanced justification for using the emergency placement to keep the Grievant from working for approximately four months. No evidence was presented of an ongoing investigation of the August 23, 1995, incident. With the facts placed before this arbitrator, it must be concluded that the Postal Service has failed to justify keeping the Grievant away from the work place for such an extended period. It is found that the emergency placement was extended into an indefinite disciplinary suspension without the Postal Service proving that this extended absence was required for the safety of other employees.

Based on all of the foregoing, it is found that the Postal Service did have just and proper cause to emergency place the Grievant for his misconduct on August 23, 1995. The Grievant engaged in unsafe acts and threatened members of management. The Postal Service has established that there was an immediate need to remove the Grievant from the work site. The Postal Service has not advanced any justification for keeping the Grievant emergency placed for approximately four months. The first thirty (30) days of the emergency placement allows more than ample time for investigating this matter and making a final determination on the Grievant's status. The Grievant is to be made whole for any additional lost wages, benefits or lost seniority".

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| ***Arbitrator Jacquelin F. Drucker, Esq.*** | | ***Case No. K94C1KD96068818*** |
| ***Frederick, MD*** | ***July 18, 1997*** | ***Page 26*** |

"The continuation of the placement while the investigation was completed also was proper. The record clearly establishes, however, that Management's entire investigation consisted of the review of Grievant's written statement, submitted by her on April 19, 1996, and conversations among themselves. For this reason, the arbitrator finds no justification for the extension of the emergency placement beyond the time period that would have reasonably allowed management to consider the limited information it had compiled".

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| ***Arbitrator Hamah R. King*** | | ***Case No. E00C4ED06265912*** |
| ***St. Paul, MN*** | ***November 14, 2007*** | ***Pages 15-16*** |

"The above notwithstanding, one question remains and that is whether the provisions of Article 16.7 authorize the Postal Service to continue an emergency suspension ad infinitum. The obvious answer is no. The Article gives the Grievant the right to file a grievance on that issue alone after thirty days. This Grievant filed such a grievance within the time allotted and yet his suspension continued for more than three months before a decision was made to discharge him. I find the Postal Service was justified in imposing the emergency suspension. However, the remedy in this grievance should and will limit the duration of that suspension to thirty days from the date it was imposed.

**AWARD**

The grievance is sustained. The Grievant is to be reinstated effective the date of this award. He is to be returned to work and made whole with back pay and all other benefits to which he would have been entitled had he not been discharged. However, the emergency suspension is found to have been valid for a period of thirty days. Therefore, the restoration of back pay and benefits will accrue beginning thirty days from the date of his suspension".

## CHAPTER 23

# THE ISSUE: **A SUPERVISOR/MANAGER OTHER THAN THE "IMMEDIATE SUPERVISOR" OF THE GRIEVANT MEETS WITH AND DISCUSSES THE GRIEVANCE AT STEP 1**

# THE DEFINITION:

The Collective Bargaining Agreement requires, under Article 15, Section 2, Step 1 that an aggrieved employee's immediate supervisor meets with, discusses, considers and renders a decision at the first Step of the grieving process.

# THE ARGUMENT:

The founders of the Collective Bargaining Agreement believed that lowest possible grievance discussion opportunity – the first Step, Step 1 – should result in resolution of the majority of filed grievances. To provide for this possibility, the founders mandated that the supervisor most familiar with a particular grievant – and that grievant's issue – would be the authority under the Collective Bargaining Agreement with responsibility to discuss and consider the grievant's issue. When someone other than the immediate supervisor discusses an individual's grievance – in particular in a disciplinary instance – that grievant is denied the process due guaranteed by the Collective Bargaining Agreement. That process due - "due process" - is that he/she benefits, potentially, from bonafide lowest possible disciplinary resolution. And, this is all required by the Collective Bargaining Agreement.

Further, the basic principle of Article 16 is that discipline shall be corrective rather than punitive. When lowest possible step resolution of a disciplinary action does not exist – through exclusion of the immediate supervisor's role – the punitive degree of the discipline is escalated.

# THE COLLECTIVE BARGAINING AGREEMENT

**"Article 15 Section 2. Grievance Procedure Steps**

**Step 1:**

(a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause.

(b) In any such discussion the supervisor shall have authority to settle the grievance.

(c) If no resolution reached as a result of such discussion, the supervisor shall render a decision orally stating the reasons for the decision.

**Article 15 Section 4. Grievance Procedure-General**

A. The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end.

**EL-921 Supervisor's Guide to Handling Grievances**

**B. Supervisory Responsibilities**

Management is responsible for directing its operations; employees and/or the unions, however, have the right to file grievances if they believe their rights have been violated. A supervisor must be in a position to respond properly should a grievance arise. Use the following guides in handling grievances:

- ❖ Treat every grievance as though it were sure to wind up in arbitration, but do not be adversarial in your approach.
- ❖ Allow employees and/or unions a full opportunity to present their points of view. Listen: don't interrupt.
- ❖ Make sure that time limits and other procedural requirements under the grievance procedure have been observed.

- ❖ Know the background of the grievance, and the existence of prior similar cases and their outcome. Know the applicable provisions of the Agreement and any information relating to past policies and practices.

- ❖ Make sure the employee and/or the union has presented the full story, specified the exact nature of the alleged violation, and stated the precise remedy that is sought.

- ❖ Make a detailed and accurate record of the results of the investigation. This should include:

  *Any pertinent payroll documents.
  *Work, personnel, or disciplinary records.
  *A summary of the employee's and/or the union's and management's positions.
  *The names and statements of witnesses.
  * The nature of any evidence presented by either side.

We must stress the importance of finding out *who*, *what*, *when*, *where*, and *why*. Make absolutely sure that you have all the facts. This requires asking questions.

It is the responsibility of local management to *resolve* as many grievances as possible at Step 1. When a grievance has merit, you should admit it and correct the situation. *You* are a manager--*you* must make decisions--don't pass the buck. Your decision on a grievance should be based on the facts of the situation and the provisions of the National Agreement. You should listen to the employee's or union's grievance and make sure of the facts.

**Do's and Don'ts**

- ❖ *Do* try to make the decision fairly.

- ❖ *Do* try to be reasonable.

- ❖ *Do* take the action you believe should be taken based upon the individual circumstances involved.

- ❖ *Do* give the employee or the union a complete answer including the reasons for your decision.

- ❖ *Don't* make a decision in anger.

- ❖ *Don't* try to "get back" at an employee or the union for some other action you didn't like.

- ❖ *Don't* tell the union you do not have the authority to make a decision.

If you do not have the answer, advise the union steward or representative that you will get back to him or her and then seek assistance from higher level management in developing a response.

The time limit for each step is a limit, not the length of time you are expected to take to reach your decision. You are expected to expedite your decision, but not at the expense of sound judgment. If you follow the policy of fair, firm, and decisive, you will find that fewer grievances are appealed to Step 2. Study the facts thoroughly and determine how they relate to the provisions of the Agreement. If you then believe the employee's or union's
grievance is unjustified, deny the grievance. Be certain you can justify your decision.

## C. Disciplinary Grievances

Once the discipline has been initiated, the employee or the union may grieve the discipline within the time limits specified in Article 15. Just because the discipline was fully discussed at the time of issuance is no reason for the supervisor to breeze through Step 1 with a quick, "Grievance Denied." Points which should be covered by the supervisor in any such
Step 1 discussion include:

- Is there a misunderstanding as to management's reasons for having initiated the discipline?

- On what basis does the employee feel that management lacked just cause?

- On what basis does the employee or the union feel that the action taken is too severe?

We recognize that in many cases the union pursues a discipline grievance simply because of internal reasons, or because there is "nothing to lose and everything to gain." Whatever the reason behind the grievance, the result is the same--management's right to invoke discipline and the way that this right was exercised has been challenged. Therefore, even though the employee and/or the union is the moving party in filing a grievance against management, management must be able to justify the action.

# THE INTERVIEW

The interview of the issuing supervisor – who is not the immediate supervisor – is strategically important. That individual can assist in our arguments that the involvement of the actual immediate supervisor would have then included a more knowledgeable investigator and decision maker. Interview with the immediate supervisor can also build upon our position that exclusion of the person in management most closely related to the grievant demonstrates denial of the processes due for lowest possible Step resolution and insurance against punitive action. Here are some suggested question paths:

For the Step 1 Supervisor – Who Is Not The Grievant's Immediate:

- How long has the grievant been employed?
- Were you present when the incident occurred?
- Who was present?
- Who investigated the incident?
- Were interviews conducted?
- Were statements obtained?
- Did you review statements?
- Which ones?
- Did you review the interviews?
- Which ones?
- In what area/operation/section do you supervise employees?
- In what area/operation/section does the grievant work?
- Who is the grievant's immediate supervisor?
- Who made the decision that you would meet for this grievance at Step 1?
- Did you meet with the grievant's immediate supervisor about the incident?
- When?

For the Grievant's Actual Immediate Supervisor:

- In what area/operation/section do you supervise employees?
- How long have you supervised there?
- How long have you supervised the grievant?
- Were you present at the time of the incident?
- You witnessed the incident?
- Were there other witnesses?
- Did you obtain witness statements?
- Did you conduct interviews?
- Did another supervisor ask you for the statements and/or interviews to review?
- Who made the decision that you would not meet at Step 1 for Mr. Smith's removal grievance?
- You issued the removal?
- Before the Step 1 was filed on July 1, 2012 did you meet with Mr. Greene – the supervisor who eventually met at Step 1?
- Did he review the statements your had gathered?
- Did he review the interviews you had conducted?
- Did he ask you how long Mr. Smith had been employed?

These questions are some illustrations of those which may very well assist us in building the "Due Processes Denied" case against the U.S. Postal Service.

# THE ARBITRATORS

A number of arbitrators have analyzed and addressed process being denied due to exclusion/failure of the immediate supervisor at Step 1. Here are the references:

***Arbitrator Hamah R. King*** ***Case No. G006-1GD06099462***
***Dallas, TX*** ***July 10, 2006*** ***Pages 15-16***

"STEP 1 OF THE NEGOTIATED GRIEVANCE PROCESS

SDO Paula Watson not only conducted the investigation of the incident in volved, she recommended the discipline, conducted the pre-disciplinary interview, signed the NOR and conducted Step 1 of the negotiated Grievance Process.

Article 15 (cited above) set out the negotiated process to which Grievant's are entitled. Thus, it is a guarantor of the process to which an employee is entitled when she/he has grieved a management action. Mandated by the National Agreement is the requirement that at Step 1, the Grievant meet with her/his immediate supervisor. It certainly can be argued that a Grievant is not harmed if someone other than his/her immediate supervisor hears the arguments for and against the alleged wrong being done to him or her. I would disagree. There is harm done to the Grievant, the Postal Service, and to the cause of industrial peace for which these agreements are entered into.

The parties to the national agreement have undoubtedly spent hours, days, months, and years negotiating and renegotiating their labor agreement including the provisions of Article 15. To blatantly and unnecessarily ignore a key provision which no doubt contains substance seriously considered is to endanger industrial peace and cooperation. *Article 15.2 Step 1* is obviously designed to accomplish the purpose set forth in Article 15.4 to wit:

> "The parties expect that good faith observance, by their respective representatives of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end."

The intent expressed in Article 15.4 is meant to be accomplished by exerting every effort at Step 1 through discussions with an opportunity for resolution between the employee and her/his immediate supervisor. The immediate supervisor is most familiar with the concerns, tendencies, capabilities, abilities and disposition of the employee. When vested with the proper authority, the supervisor is best suited to settle grievances at the lowest possible level. To unnecessarily forego this mandated process is a serious violation of the National Agreement.

## CONCLUSIONS

Because the Postal Service failed to conduct a reasonable, fair, and thorough investigation, it lacked just cause to discharge the Grievant. In addition the nature of the accusations against the Grievant who had no discipline of record would not justify his termination.

The Postal Service violated the provisions of Article 15.2 when it assigned a management representative other than the Grievant's immediate supervisor to conduct the Step 1 grievance hearing.

## AWARD

The grievance is sustained. The Grievant will be reinstated immediately and made whole. He will receive back pay and restoration of all fringe benefits which he would have accrued or been awarded if he had not been removed from the Service."

***Arbitrator I.B. Helburn*** ***Case No. G94T-1G-D97115056***
***Dallas, TX*** ***May 7, 1998*** ***Pages 7-8***

"The fatal flaw in Management's case involves the Step 1 hearing. Article 15 requires that the Step 1 be held with the grievant's immediate supervisor and that the individual be empowered to resolve the grievance. Williams testified that he was the grievant's immediate supervisor, that he interviewed Thomas and that in his absence Wales had assumed his position, which would have made Wales the grievant's immediate supervisor. Indeed, Wales issued the written notice of Indefinite Suspension – Crime Provision on July 11. Because the Step 1 meeting was held on July 7, I can only assume that Williams was on leave at the time and Wales had assumed his position. Neither the Postal Service's Step 1 grievance summary nor anything else in the record indicates that Bassett was filling in for Williams when the Step 1 was held. The Step 1 should have been held with Wales, as he was acting for Williams.

While the Step 1 did result in a commitment from the Postal Service to pay the grievant until the end of the notice period, that commitment does not establish that Bassett was free to settle the grievance in its entirety. He had not spoken with Thomas before the suspension and had not been involved in the decision to suspend. While the Postal Service must show only reasonable cause for its action in this case, the use of a more lenient standard than just cause does not allow Management to ignore other provisions of the National Agreement or the grievant's due process rights. The National Agreement requires the Step 1 to be held with the immediate supervisor and numerous arbitrators have held that failure to do so is a breech of the grievant's due process rights which requires a ruling in the grievant's favor. The award in the Union's favor below is solely because of this breech of the contract."

"The Union's most potent argument relates to the fact that Postmaster
Kinney heard the case at Step 1, and not Ms. Weal's immediate supervisor. The record confirms that during the relevant time period, 204 (b) Supervisor
Lanita Lewis was in fact that individual, as Mr. Kinney candidly admitted during direct examination. The postmaster reasoned that he heard the grievance mostly because of the acting supervisor issue, and said to the best of his recollection Ms. Lewis was still there at the time. In response to this argument, the Postal Service reasons that it tried to do the right thing in this regard, and supplies common sense logic on the probability of a 204 (b)
who did not issue the discipline in question countermanding a supervisor. The postmaster additionally denied that Steward Gray had objected when he met with her at Step 1, and offered that 204 (b)'s do hear grievances, but it depends on the issue.

I credit the APWU's argument in this regard, and have recently sustained a
grievance in part on these same grounds on this panel. See, United States Postal Service and American Postal Workers Union, Case No. CO6C-4C-D
07138658113053314 (Pecklers, 2008). The Union has also furnished persuasive argument on this point. See e.g. United States Postal Service and American Postal Workers Union, Case No. H98C-4H-D 00243135/SD92900 (Odom, 2002); United States Postal Service and American Postal Workers Union, Case No. AO0C-4A-D 05024282/TAP105 (Harris, 2006). It very well may be that the postmaster had legitimate concerns and decided to hear the Step 1 himself, and that Management wanted to do the right thing. The fact remains, that the parties at the National level have ordained that grievances are heard at Step 1 by the immediate supervisor.

The applicable JCAM also makes it abundantly clear that 204(b)'s are permitted and required to act in this capacity. A Step 4 settlement to this effect
was likewise reached in Case NO. H4N-5E-C 36561, February 9, 1988. In closing, the words of Arbitrator King in my award cited above, are instructive: "Article 15 sets out the negotiated process to which grievants are entitled. Thus it is a guarantor of the process to which an employee is entitled when she/he has grieved a management action." See, United States Postal Service and American Postal Workers Union, Case No. GOOC-1G-D 06099462 (King, 2006).

The grievance will accordingly be sustained in part."

"However, there is considerable doubt in my mind as to the propriety of Cappello conducting the Step 1. I assume he was qualified to hear the Step 1, but that does not mean he should have done so. It seems apparent that, for efficient functioning, the window clerks needed a SCS, or a bargaining unit member functioning as a temporary supervisor (204b), during the month after smith went out on sick leave. I note that Cappello testified that Smith was on extended sick leave and it was assumed that he was not returning because he had applied for non-job related disability.

When Cappello was asked, on cross-examination, if he had a window supervisor at the time of the Step 1, he replied: "I may or may not have had a clerk doing it in a 204b capacity. He could have done Step 1." I find it implausible that Cappello did not know if he had assigned a clerk to supervise the window operations, especially at a time when the Inspection Service had been called in because of missing stamp stock. If a 204b was in place, s/he not only could (as Cappello stated), but also should, have handled the Step 1.

The National Agreement is quite clear: the immediate supervisor is to conduct the Step 1 meeting. I note that in his "Step 1 Grievance Worksheet," Cappello wrote: "Video tapes were reviewed by Dennis Bowie, Angel Pagan in the presence of myself and Inspector G. Kane." There is no reason why a 204b who supervised window operations after Smith left could not have reviewed the video, read in IM, read the Notice of Proposed Removal, and done other such preparation for the Step 1 meeting. Had the 204b done so, s/he too would have been qualified to conduct the Step 1 meeting. Certainly it is possible to describe circumstances in which it is impossible for an immediate supervisor to conduct a Step 1, but such circumstances do not appear to apply here.

To summarize, the Grievant mishandled postal funds. However, the Service failed its contractual responsibilities to accord the Grievant important due process rights. The Service violated Article 15 by preventing the direct supervisor of window clerks from conducting the Step 1 meeting."

***Arbitrator Michael J. Pecklers, Esq.*** ***Case No. C00C1CD08072723***
***Bellmawr, NJ*** ***March 25, 2009*** ***Pages 15-17***

"Another issue that the parties are intimately familiar with is that of the Step 1 Meeting not being conducted by the employee's immediate supervisor. Such a result is mandated by Article 15.2 Step 1 of the C.B.A. and the JCIM, and reinforced by a regional JCAM covering the South Jersey District. In the case at bar, the grievance was heard at that level by MDO Campagno at the direction of the plant manager, due to the Postal Service's perception that Supervisor Fennis Shaw was not impartial as she was witnessed hugging Mr. Murphy on the video. I find no language in the National Agreement to support such a construction. And assuming without deciding that this was permissible, the Union has correctly argued that Management could have had Supervisor Kim Parker hear the Step 1. In that regard, the record confirms that while Ms. Shaw was Mr. Murphuy's supervisor when he was on a detail, but the time the NOR was issued he was back in his bid assignment and supervised by Ms. Parker. On these bases, a finding is therefore required that a contractual violation is present. *See*, United States Postal Service and American Postal Workers Union, AFL-CIO, Case No. C06C-4CD07138658/B053314 (Peckers, 2008); United States Postal Service and American Postal Workers Union, AFL-CIO, Case No. C06C-4C-D 07318796/LGWEAL07 (Pecklers, 2008); *see also*, United States Postal Service and American Postal Workers Union, AFL-CIO, Case No. A00C-4A-D05024282/TAP105 (Harris, 2006).

On the totality of the foregoing findings of fact, I therefore conclude that the grievance must be sustained in full, with Mr. Murphy returned to duty and made whole. IT IS SO ORDERED."

***Arbitrator Michael J. Pecklers, Esq.*** ***Case No. C06C4CD07196988***
***Marlton, NJ*** ***January 7, 2009*** ***Page 1***

"Grievance sustained in part. While the Postal Service prevailed on the merits, the APWU established that Management violated Article 15.2 of the National Agreement and the JCAM, but not permitting the immediate supervisor to hear the case at Step 1. This violated Ms. Walls' due process rights, and requires her return to duty in a position with no fiduciary responsibilities. No back pay is awarded."